(5)

No. 92-7549

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1993

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THOMAS N. SCHIRO,

*Petitioner,*

v.

RICHARD CLARK, Superintendent,
Indiana State Prison, *et al.*

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**On Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit**

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## JOINT APPENDIX

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**PETITION FOR WRIT OF CERTIORARI FILED FEBRUARY 5, 1993
CERTIORARI GRANTED MAY 17, 1993**

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## RELEVANT DOCKET ENTRIES

| DATE | ENTRY |
|---|---|
| 10 February 1981 | Information filed. |
| 9 April 1981 | State files Count IIA and Count IIIA (Requests for the death penalty). |
| 16 April 1981 | Schiro files motion to interpose the defense of insanity. |
| 21 April 1981 | Venue moved from Vanderburgh Circuit Court to Brown Circuit Court. |
| 2 September 1981 | Voir dire commences. |
| 12 September 1981 | Jury retires at 2:15 and returns verdict at 7:15 p.m. finding Schiro guilty of felony murder during the commission or attempted commission of a rape. The jury is instructed to return on September 15, 1981 at 1:00 p.m. for the penalty phase. |
| 15 September 1981 | Evidence from guilt phase incorporated for purposes of penalty phase. Jury retires at 1:47 p.m. and returns recommendation against death at 2:48 p.m. |
| 2 October 1981 | Trial court overrides jury recommendation and imposes death penalty. |
| 11 February 1983 | Indiana Supreme Court remands case to the trial court for a statement of reasons imposing the death penalty. |
| 22 February 1983 | Trial court files nunc pro tunc entry with Indiana Supreme Court as to reasons for imposition of death penalty. |
| 5 August 1983 | Indiana Supreme Court affirms conviction and death sentence on direct appeal. |
| 28 June 1985 | Indiana Supreme Court affirms denial of first state post-conviction relief petition. |

| DATE | ENTRY |
|---|---|
| 15 January 1988 | Trial court denies second state petition for post-conviction relief. |
| 8 February 1989 | Indiana Supreme Court affirms denial of second state petition for post-conviction relief. |
| 26 December 1990 | District Court denies habeas corpus relief. |
| 4 February 1991 | Schiro files Notice of Appeal and Motion to File Instanter in the District Court. |
| 5 March 1991 | District Court grants Certificate of Probable Cause. |
| 8 May 1992 | Court of Appeals affirms the denial of habeas corpus relief. |
| 1 June 1992 | Court of Appeals issues mandate. |
| 18 August 1992 | Schiro files Motion to Recall Mandate and Accept Petition for Rehearing Instanter. |
| 25 August 1992 | Court of Appeals grants Motion to Accept Petition for Rehearing Instanter; Court of Appeals denies Motion to Recall Mandate. |
| 8 September 1992 | Court of Appeals denies rehearing and suggestion for rehearing en banc. |



VANDERBURGH CIRCUIT COURT
(NCT)

1981 TERM

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No. 3101

STATE OF INDIANA

vs.

THOMAS N. SCHIRO

---

**INFORMATION FOR COUNT I: MURDER**

State of Indiana, Vanderburgh County, ss:

DONALD ERK being duly sworn upon his oath says that THOMAS N. SCHIRO on or about the 5th day of February A.D., 1981, at said County and State as affiant verily believes: did knowingly kill Laura Luebbehusen by beating, striking and strangling the said Laura Luebbehusen, thereby causing her to die by asphyxiation, all in violation of I.C. 35-42-1-1(1).

Then and there being contrary to the form of the Statute, in such cases made and provided, and against the peace and dignity of the State of Indiana.

/s/ Donald Erk

(Affirmation Omitted in Printing)

## INFORMATION FOR COUNT II: MURDER

State of Indiana, Vanderburgh County, ss:

DONALD ERK being duly sworn upon his oath says that THOMAS N. SCHIRO on or about the 5th day of February A.D., 1981, at said County and State as affiant verily believes: did kill Laura Luebbehusen by beating, striking and strangling the said Laura Luebbehusen, thereby causing her to die by asphyxiation, while the said Thomas N. Schiro was committing and attempting to commit the crime of rape, to-wit: knowingly and by the use of force and the threat of force, having sexual intercourse with the said Laura Luebbehusen, a member of the opposite sex, without the consent of the said Laura Luebbehusen, all in violation of I.C. 35-42-1-1(2).

Then and there being contrary to the form of the Statute, in such cases made and provided, and against the peace and dignity of the State of Indiana.

/s/ Donald Erk

(Affirmation Omitted in Printing)



## INFORMATION FOR COUNT III: MURDER

State of Indiana, Vanderburgh County, ss:

DONALD ERK being duly sworn upon his oath says that THOMAS N. SCHIRO on or about the 5th day of February A.D., 1981, at said County and State as affiant verily believes: did kill Laura Luebbehusen by beating, striking and strangling the said Laura Luebbehusen, thereby causing her to die by asphyxiation, while the said Thomas N. Schiro was committing and attempting to commit the crime of criminal deviate conduct, to-wit: knowingly causing Laura Luebbehusen to submit to deviate sexual conduct, to-wit: knowingly and by the use of force and threat of force cause penetration, by an object, of the sex organ of the said Laura Luebbehusen, all in violation of I.C. 35-42-1-1(2).

Then and there being contrary to the form of the Statute, in such cases made and provided, and against the peace and dignity of the State of Indiana.

/s/ Donald Erk

(Affirmation Omitted in Printing)

VANDERBURGH CIRCUIT COURT

(Caption Omitted in Printing)

**CHARGING INFORMATION FOR DEATH PENALTY**

(Filed April 9, 1981)

COUNT IIA—DEATH SENTENCE

The crime of Murder, as charged in Count II of the Information filed herein, was committted by the defendant, Thomas N. Schiro, and the following aggravating circumstances exist, which justify the imposition of the death sentence.

1) The murder of Laura Luebbehusen charged in Count II was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Rape, as more particularly described in the Information, constituting an aggravating circumstance justifying imposition of the death penalty, as set forth in I.C. 35-50-2-9(b)(1).

WHEREFORE, the State of Indiana prays that the Penalty of Death be imposed on the defendant, Thomas N. Schiro.

/s/ Robert J. Pigman
ROBERT J. PIGMAN
Chief Deputy Prosecuting Attorney

(Affirmation Omitted in Printing)



COUNT IIIA—DEATH SENTENCE

The crime of Murder, as charged in Count III of the Information filed herein, was committed by the defendant, Thomas N. Schiro, and the following aggravating circumstances exist, which justify the imposition of the death sentence.

1) The murder of Laura Luebbehusen charged in Count III was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Criminal Deviate Conduct, as more particularly described in the Information, constituting an aggravating circumstance justifying imposition of the death penalty, as set forth in I.C. 35-50-2-9(b)(1).

WHEREFORE, the State of Indiana prays that the Penalty of Death be imposed on the defendant, Thomas N. Schiro.

/s/ Robert J. Pigman
ROBERT J. PIGMAN
Chief Deputy Prosecuting Attorney

(Affirmation Omitted in Printing)

IN THE BROWN CIRCUIT COURT

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Cause No. 81 CR 243

STATE OF INDIANA

v.

THOMAS N. SCHIRO

---

**STATE'S TENDERED INSTRUCTION SEVEN (7)**

PLAINTIFF'S FINAL INSTRUCTION NO. ——

An [voluntarily]* intoxicated person is responsible for his criminal conduct unless his intoxication renders him incapable of acting with the required specific intent.

Given

Refused X

Given as modified

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[* As added by the trial court before the instruction was refused.]



**PORTION OF INSTRUCTION CONFERENCE**

* * * *

The Defendant would object to the Plaintiff's Final Instruction Number Seven, which reads, "a voluntarily intoxicated person is responsible for his criminal conduct unless his intoxication renders him incapable of acting with the required specific intent." for the reason that it is an incomplete statement in that the Court, or the instruction does not then instruct the jury as to what specific intent, if any, is required in defense . . . in charges of this nature, and therefore is in addition confusing to the jury as to the meaning of that instruction and how it should apply to the facts and charges of this particular case.

THE COURT: You're talking about the prosecution's seven?

MR. KEATING: Yes, and I hope I correctly numbered that. I've . . . you said they were in sequence . . .

THE COURT: I just want to . . . which one that is.

MR. KEATING: Your Honor, it's the one which says . . . starts a "voluntarily intoxicated person" . . .

THE COURT: That was given as modified.

MR. KEATING: Correct.

THE COURT: I'm going to . . . on that Number Seven, I'm going to reverse my former ruling and I'm going to refuse it, Mr. Atkinson. That's on the question of an intoxicated person.

MR. ATKINSON: You are refusing?

THE COURT: Yes.

MR. ATKINSON: Thank you.

THE COURT: Alright, I have refused that. Now, do you want to . . .

MR. KEATING: You are refusing it?

THE COURT: Yes.

MR. KEATING: Well, that takes care of that one.

* * *

## PRELIMINARY INSTRUCTIONS AT THE GUILT PHASE

### COURT'S PRELIMINARY INSTRUCTION NO. 1

MEMBERS OF THE JURY:

You have been selected as jurors and have taken an oath to well and truly try this cause. It may take hours for you to hear all of the evidence and the arguments of counsel.

During the progress of the trial there will be periods of time during which you will be allowed to separate, such as recesses for rest periods, for meals and overnight. During those periods of time that you are outside the courtroom and are permitted to separate, you must not talk about this cause among yourselves or with anyone else.

During the trial, do not talk to any of the parties, their lawyers or any of the witnesses.

If any attempt is made by anyone to talk to you concerning the matters here under consideration, you should report that fact to the Court immediately.

There may be publicity in newspapers, on radio or possibly on television concerning this trial. You should not read or listen to these accounts but should confine your attention to the Court proceeding, listen attentively to the evidence as it comes from the witnesses, and reach a verdict solely upon what you hear and see in this Court.

You should keep an open mind. You should not form or express an opinion during the trial and should reach no conclusion in this cause until you have heard all of the evidence, the arguments of counsel, and the final instructions as to the law which will be given to you by the Court.

This is a Criminal Case brought by the State of Indiana against Thomas N. Schiro. This Case has been venued



from Vanderburgh County to Brown County and was commenced by the filing on February 5, 1980 of an information for Murder, Counts I, II, III. On April 9, 1981 in the Circuit Court there was filed Count IIA and Count IIA, Death Sentence in this Case.

35-42-1-1 Murder

Sec. 1. A person who:

(1) Knowingly or intentionally kills another human being; or

(2) Kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery; commits murder, a felony.

35-50-2-9 Death sentence

Sec. 9. (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b) of this section. In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

* * * *

(5) The defendant commited the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either (i) the victim was acting in the course of duty or (ii) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether he has been convicted of that other murder.

(9) The defendant was under a sentence of life imprisonment at the time of the murder.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.



(7) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. *As added by Acts 1977, S.84, SEC. 122, eff. October 1, 1977.*

Preliminary Instructions

The defendant has entered a plea of not guilty and special plea of not responsible by reason of insanity.

The burden rests upon the State of Indiana to prove to each of you beyond a reasonable doubt, each and every essential element of the charge contained in the information.

On the issue of insanity, the burden rests upon the defendant to prove to each of you by a preponderance of the evidence that he was not sane at the time of the offense charged.

The charge which has been filed is the formal method of bringing the defendant to trial.

The fact that a charge has been filed, the defendant arrested and brought to trial is not to be considered by you as any evidence of guilt.



## 1.13 INFORMATION OR INDICTMENT—NOT EVIDENCE—INSANITY

The defendant has entered a plea of not guilty and special plea of not responsible by reason of insanity.

The burden rests upon the State of Indiana to prove to each of you beyond a reasonable doubt, each and every essential element of the charge contained in the information.

On the issue of insanity, the burden rests upon the defendant to prove to each of you by a preponderance of the evidence that he was not sane at the time of the offense charged.

The fact that a charge has been filed, the defendant arrested and brought to trial is not to be considered by you as any evidence of guilt.

## 1.15 INSANITY—DEFENSE I.C. 35-41-3-6

Insanity is a defense to the crime charged. The legal defense of insanity is defined as follows:

A person is not responsible for criminal conduct if at the time of such conduct as the result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

## COURT'S PRELIMINARY INSTRUCTION NO. 3

The information in this case is the formal method of accusing the Defendant of a crime and placing him on trial. It is not any evidence against the Defendant and does not in any way show his guilt.

## COURT'S PRELIMINARY INSTRUCTION NO. 4

In this case, you must presume that the Defendant is innocent, and you must continue to believe he is innocent, step by step, through the trial until the State proves by the evidence to be presented, that the Defendant is guilty beyond a reasonable doubt.

Since the Defendant is presumed to be innocent, he is not required to prove or explain anything. The real burden of proving guilty beyond a reasonable doubt rests now and throughout the entire trial on the State.

If the State fails to prove beyond a reasonable doubt every essential element of the crimes charged, or if it fails beyond a reasonable doubt every essential element of any lesser crimes included in the crimes charged, or if there remains in your mind a reasonable doubt about the Defendant's guilt, you must find him not guilty.

## COURT'S PRELIMINARY INSTRUCTION NO. 5

A reasonable doubt is an actual and substantial doubt that arises in the mind after a fair and impartial consideration and weighing of all the evidence and circumstances in the case. Not every doubt is a reasonable one. In order that there can be such doubt, it must be based upon some reason arising out of the evidence or lack of evidence concerning the (essential) (necessary) elements of the case. You may not act upon a mere whim, speculation, guess, or surmise and you may not convict upon a mere possibility of guilt. Before you can find the Defendant guilty as charged, the evidence in the case must produce in your own mind such a firm belief of guilt, that you would be freely willing to act upon that belief in any matter of the highest concern and importance to your own dearest interest.

This rule on reasonable doubt applies to each of you individually; and it is your personal duty to refuse to convict as long as you have a reasonable doubt as to the Defendant's guilt as charged; likewise, it is your personal duty to vote for conviction, as long as you are convinced beyond a reasonable doubt, of the Defendant's guilt as charged.



## COURT'S PRELIMINARY INSTRUCTION NO. 6

In considering the evidence in this cause, you are permitted to draw reasonable inferences from the facts proved. A reasonable inference is one which naturally flows from the facts proved.

## COURT'S PRELIMINARY INSTRUCTION NO. 7

Facts in a criminal prosecution may be established and proved by circumstances as well as by direct evidence.

Circumstantial evidence is the proof of such facts and circumstances, connected with, and surrounding the commission of the crime charged, from which inferences may be drawn which tend to show the guilt or innocence of the person charged, and if the inferences thus drawn are sufficient to satisfy the minds of the jury beyond a reasonable doubt, of the existence of the facts sought to be established, then such facts would be sufficiently proven and the jury would be justified in acting thereon in the rendition of their verdict.

Before the inferences can be properly drawn from circumstances, the circumstances themselves should be established to the satisfaction of the jury. In a criminal case the Defendant may be convicted upon circumstantial evidence alone, or upon circumstantial and direct evidence combined. It is the duty of the jury in rendering the verdict to consider all the evidence in the case, whether it be circumstantial or direct, for the purpose of determining the guilt or innocence of the Defendant, keeping in view the fact, that in order to convict, the Defendant must be proved guilty beyond a reasonable doubt.

## COURT'S PRELIMINARY INSTRUCTION NO. 8

You are the sole judges of the credibility of all the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his ability and opportunity to observe; his age; his memory, manner, and conduct while testifying; any interest, bias, or prejudice he may have; his relationships with other witnesses or the Defendant; and the reasonableness of his testimony considered in the light of all the evidence on the case.

## COURT'S PRELIMINARY INSTRUCTION NO. 9

If it can be reasonably done, you should fit the evidence in this case to the presumption that the Defendant is innocent and that every witness is telling the truth. You have the right to use that knowledge and experience which you possess in common with men in general, in regard to the matter about which a witness has testified, but you should not disregard the testimony of any witness without careful consideration and without just cause.

However, if you find so much conflict in the testimony of the witness that you cannot believe all their testimonies, then you are permitted to determine what or whom you will or will not believe.

In weighing the testimony to make that determination, the number of witnesses who have testified on different sides of an issue or the quantity of evidence introduced on one side or the other, is not necessarily of the greater weight. The evidence given upon any fact in issue which convinces you most strongly of its truthfulness, is the greater weight.

## COURT'S PRELIMINARY INSTRUCTION NO. 10

During the trial, certain exhibits may be offered in evidence. When admitted into evidence by the Court, each of you should carefully examine these exhibits, without discussion, at the time they are submitted to you. The exhibits will not be sent to the jury room with you when you retire to deliberations.



## COURT'S PRELIMINARY INSTRUCTION NO. 11

It is necessary now that you understand how the trial is to proceed.

First, the attorneys will have an opportunity to make opening statements to you. These opening statements are not evidence and are made by the attorneys only to acquaint you with the facts they expect to prove. They are to be considered only as a guide so you may better understand and evaluate the evidence as it comes to you.

Following the opening statements witnesses will be called to testify. They will be placed under oath and then examined and cross examined by the attorneys. Documents and other tangible exhibits may also be produced as evidence.

When the evidence is completed, the attorneys will argue the merits of the case. What the attorneys say is not evidence. Their arguments are given to assist you in evaluating the evidence and in arriving at correct conclusions concerning the facts, but they are also intended to persuade you to a particular verdict; and those arguments may be accepted or rejected as you see fit.

Finally, just before you retire to consider your verdict, the Court will instruct you on the law applicable to the case.

Dated at ———, Indiana, this ——— day of ——, 19—.

———————————

Judge

## FINAL INSTRUCTIONS AT GUILT PHASE

(Filed Mar. 1, 1982)

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### FINAL INSTRUCTION 1

You are to consider all the instructions as a whole and are to regard each with the others given to you. Do not single out any certain sentence or any individual point or instructions and ignore the others.

### FINAL INSTRUCTION 2

Since this is a criminal case the Constitution of the State of Indiana makes you the judges of both the law and the facts. Though this means that you are to determine the law for yourself, it does not mean that you have the right to make, repeal, disregard, or ignore the law as it exists. The instructions of the court are the best source as to the law applicable to this case.



### FINAL INSTRUCTION 3

The defendant has entered a plea of not guilty and special plea of not responsible by reason of insanity.

The burden rests upon the State of Indiana to prove to each of you beyond a reasonable doubt, each and every essential element of the charge contained in the indictment.

On the issue of insanity, the burden rests upon the defendant to prove to each of you by a preponderance of the evidence that he was not sane at the time of the offense charged.

The charge which has been filed is the formal method of bringing the defendant to trial.

The fact that a charge has been filed, the defendant arrested and brought to trial is not to be considered by you as any evidence of guilt.

### FINAL INSTRUCTION 4

The Indiana Statutes defining the offenses charged, including the elements contained therein, insofar as they are applicable, reads as follows:

MURDER

"A person who:

(1) Knowingly or intentionally kills another human being . . . or,

(2) Kills another human being while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery, . . .

commits murder, a felony."

The term "human being" means a person who was born and was alive.

## FINAL INSTRUCTION 5

A person engages in conduct "intentionally" if, when he engages in the conduct, it is his conscious objective to do so.

A person engages in conduct "knowingly" if, when he engages in the conduct, he is aware of a high probability that he is doing so.

## FINAL INSTRUCTION 6

Insanity is a defense as to the crimes charged. The legal defense of insanity is defined as follows:

A person is not responsible for criminal conduct if at the time of such conduct as the result of mental disease or defect he lacks substantial capacity either to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law.

The terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

## FINAL INSTRUCTION 7

The term "mental disease" generally is used to denote a condition capable of either improving or deteriorating.

The term "mental defect" generally is used to denote a condition which is not considered capable of either improving or deteriorating and which may be either congenital, or the result of injury, or the residual effect of a physical or mental disease.

## FINAL INSTRUCTION 8

To sustain the charge of murder, the State must prove the following proposition:

First:

That the defendant engaged in the conduct which caused the death of Laura Luebbehusen;



Second:

That when the defendant did so, he knew the conduct would or intended the conduct to cause the death of Laura Luebbehusen.

If you find from your consideration of all the evidence that each of these propositions has been proved beyond a reasonable doubt, and that the defendant was not insane at the time of the murder, then you should find the defendant guilty.

## FINAL INSTRUCTION 9

In reaching your decision on whether the defendant, Thomas N. Shiro, is guilty, not guilty, or not responsible by reason of insanity at the time of the offense, you must base your decision upon the evidence presented, without concern for the consequences of such decision. The procedure that would follow if there is a verdict of not responsible by reason of insanity at the time of the offense cannot properly motivate you in reaching your decision.

## FINAL INSTRUCTION 10

EVIDENCE IN GENERAL

12.33 DATE OF CRIME CHARGED I.C. 35-3.1-1-2

The information states that the crime charged was committed (or or about) Feb. 5, 1981. If you find that the crime charged was committed, the State is not required to prove that it was committed on that particular date.

NOTE: This instruction should be given only when there is a variance between the date alleged in the indictment or information and the evidence, and all dates are within the period of limitations.

## FINAL INSTRUCTION 11

Under the law of this State, a person charged with a crime is presumed to be innocent. To overcome the presumption of innocence, the State must prove the de-

fendant guilty to each essential element of the crime charged, beyond a reasonable doubt.

The defendant is not required to present any evidence to prove his innocence. However, in this case the defendant has the burden of proving he was insane at the time of the act charged, by a preponderance of the evidence.

The term "preponderance of the evidence" means the weight of the evidence. The evidence as to the issue of insanity which convinces you most strongly of its truthfulness is of greater weight.

## FINAL INSTRUCTION 12

A "reasonable doubt" is a fair, actual and logical doubt that arises in your mind after an impartial consideration of all of the evidence and circumstances in the case. It should be a doubt based upon reason and common sense and not a doubt based upon imagination or speculation.

If, after considering all of the evidence, you have reached a firm belief in the guilt of the defendant that you would feel safe to act upon that belief, without hesitation, in a matter of the highest concern and importance to you, then you will have reached that degree of certainty which excludes reasonable doubt and authorizes conviction.

The rule of law which requires proof of guilt beyond a reasonable doubt applies to each juror individually. Each of you must refuse to vote for conviction unless you are convinced beyond a reasonable doubt of the defendant's guilt. Your verdict must be unanimous.

## FINAL INSTRUCTION 13

You are the exclusive judges of the evidence, the credibility of the witnesses and of the weight to be given to the testimony of each of them. In considering the testimony of any witness, you may take into account his or her ability and opportunity to observe; the manner and conduct of the witness while testifying; any interest, bias or prejudice the witness may have; any relationship with other witnesses or interested parties; and the reasonable-



ness of the testimony of the witness considered in the light of all of the evidence in the case.

You should attempt to fit the evidence to the presumption that the defendant is innocent and the theory that every witness is telling the truth. You should not disregard the testimony of any witness without a reason and without careful consideration. If you find conflicting testimony you must determine which of the witnesses you will believe and which of them you will disbelieve.

In weighing the testimony to determine what or whom you will believe, you should use your own knowledge, experience and common sense gained from day to day living. The number of witnesses who testify to a particular fact, or the quantity of evidence on a particular point need not control your determination of the truth. You should give the greatest weight to that evidence which convinces you most strongly of its truthfulness.

## FINAL INSTRUCTION 14

Direct evidence means evidence that directly proves a fact, without an inference, and which in itself, if true, conclusively establishes that fact.

Circumstantial evidence means evidence that proves a fact from which an inference of the existence of another fact may be drawn.

An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts.

It is not necessary that facts be proved by direct evidence. Both direct evidence and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.

## FINAL INSTRUCTION 15

Motive is that which prompt a person to act. The State is not required to prove a motive for the commission of the crime charged.

## FINAL INSTRUCTION 16

If the jury returns a verdict of not guilty by reason of insanity you are instructed that the law provides that the court shall initiate and conduct a mental competency hearing to determine whether the defendant shall be transferred to the care and custody of the Department of Mental Health for civil commitment proceedings.

## FINAL INSTRUCTION 17

Experts have testified as to their findings and opinions as to the mental condition of the defendant. You should consider the expert testimony in light of all other testimony presented concerning the development. adaptation and functioning of the defendant's mental and emotional processes and behavior controls and not necessarily accept the ultimate conclusions of the experts as to the defendant's legal sanity or insanity.

You must decide the extent of the defendant's mental disability from a consideration of all of the evidence relating to such disability.

## FINAL INSTRUCTION 18

During the progress of the trial, certain questions were asked and certain exhibits were offered which the court ruled not admissible into evidence. You must not concern yourselves with the reasons for the rulings since the production of evidence is strictly controlled by rules of law.

You must not consider an exhibit or testimony which the Court ordered stricken from the record. In fact, such matter is to be treated as though you had never heard of it.

Nothing that I have said during the trial is intended as any suggestion of what facts or what verdict you should find. Each of you, as jurors, must determine the facts and the verdict.



## FINAL INSTRUCTION 19

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges—judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case.

## FINAL INSTRUCTION 20

It is necessary, from this time until you are discharged by the Court, that you remain together, and in charge of the officer detailed for that purpose. You must not communicate on any subject whatsoever with any person other than members of this Jury, except to answer such questions as may be asked of you by the officer by direction of this Court. If at any time you have any desire to communicate with the Court, you may notify the officer to that effect and he will communicate with me.

## FINAL INSTRUCTION 21

The court is submitting to you forms of possible verdicts you may return in this case.

These forms will be supplied to you when you retire to the jury room for deliberation. Upon retiring to the jury room, you will select one of your members as a

foreman. The foreman will preside over your deliberations and must sign and date the verdict(s) to which you all agree. The foreman must return all verdict forms into open court.

PLAINTIFF'S FINAL INSTRUCTION NO. 3

Medical insanity is not the same as "legal insanity" as a bar to criminal prosecution.

CITATION:

*Marx v. State*, 236 Ind. 455.

Given ✔

Refused ———

Given as Modified: ———

PLAINTIFF'S FINAL INSTRUCTION NO. 5

A lay witness may express an opinion on the question of sanity or insanity of the defendant if a factual basis for observation has been stated.

CITATION:

*Cockrum v. State*, 243 N.E. 2d 479 (1968).

*Grubb v. State*, 117 Ind. 277.

Given ✔

Refused ———

Given as Modified: ———

PLAINTIFF'S FINAL INSTRUCTION NO. 9

The Jury has the right to accept or reject any or all of the testimony of witnesses, either expert or lay witnesses, on the question of insanity. You are not required to necessarily accept the ultimate conclusions of the experts as to the defendant's legal sanity or insanity. The opin-



ions of experts may be considered along with all of the other evidence relating to that question.

CITATION:

*Johnson v. State*, 1970, 264 N.E. 2d 57.

Given ✔

Refused ———

Given as Modified: ———

DEFENDANT'S INSTRUCTION NO. 1

You are instructed that the offense of Rape is defined as follows:

"A person who knowingly or intentionally has sexual intercourse with a member of the opposite sex when:

(1) The other person is compelled by force or imminent threat of force;

(2) * * *

(3) * * *

commits, rape * * *"

The term "sexual intercourse" means an act that includes any penetration of the female sex organ by the male sex organ.

/s/ Michael C. Keating
Attorney for Defendant

## DEFENDANT'S INSTRUCTION NO. 2

You are instructed that the offense of Criminal Deviate Conduct is defined as follows:

"A person who knowingly or intentionally causes penetration, by an object or any other means, of the sex organ or anus of another person when:

(1) The other person is compelled by force or imminent threat of force;

(2) * * *

(3) * * *

commits criminal deviate conduct * * *"

/s/ Michael C. Keating
Attorney for Defendant

## DEFENDANT'S INSTRUCTION NO. 3

In addition to verdicts of guilty, not guilty, and not responsible by reason of insanity, a verdict of guilty but mentally ill at the time of the offense will be submitted to you on all three counts of the information.

Mentally ill, as this term is used in such a verdict, means having a psychiatric disorder which substantially impairs the person's thinking, feeling or behavior and impairs the person's ability to function.

/s/ Michael C. Keating
Attorney for Defendant



## DEFENDANT'S INSTRUCTION NO. 4

The burden is on the State of Indiana to prove beyond a reasonable doubt that at the time of the commission of the alleged offense the defendant was not mentally ill as that term has been defined.

Therefore, if you find beyond a reasonable doubt that the defendant is guilty of the offense as charged, or of a lesser included offense, you then must determine whether the defendant was mentally ill at the time of the commission of that offense. If you find that the defendant was mentally ill at the time of the offense, or if you have a reasonable doubt as to whether he was mentally ill, and if the defendant has failed to prove his defense of insanity, then your verdict shall be guilty but mentally ill at the time of the offense.

/s/ Michael C. Keating
Attorney for Defendant

## DEFENDANT'S INSTRUCTION NO. 5

The burden rests upon the State of Indiana to prove beyond a reasonable doubt that the defendant committed each and every element of the crime charged. The defendant is not on trial for any offense other than that charged in the Information, and you may not consider evidence of prior offenses by the defendant in determining his guilt or innocence of the crime charged.

/s/ Michael C. Keating
Attorney for Defendant

## DEFENDANT'S INSTRUCTION NO. 6

Where there is a reasonable doubt existing in your minds as to the defendant's guilt of an offense, either charged or included in the information, he must be found not guilty.

Where there is a reasonable doubt existing in your minds as to which of two or more degrees of an offense the defendant may be guilty, he must be convicted of the lower degree only.

/s/ Michael C. Keating
Attorney for Defendant

## DEFENDANT'S INSTRUCTION NO. 7

The term "by a preponderance of the evidence" means that an issue in the case which the party has the burden of proving is more probably true than not true. The defendant has interposed the defense of insanity in this case, and thus the burden is upon the defendant to prove this defense by a preponderance of the evidence.

If you find, from a consideration of all of the evidence, that at the time of the alleged offense it is more probably true than not true that the defendant, as a result of mental disease or defect, lacked substantial capacity either to appreciate the wrongfulness of the conduct, or to conform his conduct to the requirements of law, then your verdict should be "Not responsible by reason of insanity at the time of the offense."

/s/ Michael C. Keating
Attorney for Defendant

Defense of Insanity



## DEFENDANT'S INSTRUCTION NO. 8

The term "preponderance of the evidence" means the weight of the evidence. The number of witnesses testifying to a fact on one side or the other or the quantity of evidence introduced on one side or the other is not necessarily of the greater weight. The evidence given upon any fact in issue which convinces you most strongly of its truthfulness is of the greater weight.

/s/ Michael C. Keating
Attorney for Defendant

Defense of Insanity

## DEFENDANT'S INSTRUCTION NO. 9

If the evidence in this case is susceptible of two constructions or interpretations, each of which appears to you to be reasonable, and one of which points to the guilt of the defendant, and the other to his innocence, it is your duty, under the law, to adopt that interpretation which will admit of the defendant's innocence, and reject that which points to his guilt.

You will notice that this rule appears only when both of the two possible opposing conclusions appear to you to be reasonable. If, on the other hand, one of the possible conclusions should appear to you to be reasonable and the other to be unreasonable, it would be your duty to adhere to the reasonable deduction and to reject the unreasonable, bearing in mind, however, that even if the reasonable deduction points to defendant's guilt, the entire proof must carry the convincing force required by law to support a verdict of guilt.

/s/ Michael C. Keating
Attorney for Defendant

## DEFENDANT'S INSTRUCTION NO. 10

The offenses charged in Counts I, II and III also induce the crime of involuntary manslaughter, which is defined as follows:

"A person who kills another human being while committing or attempting to commit:

(1) A felony that inherently poses a risk of serious bodily injury;

(2) A misdemeanor that inherently poses a risk of serious bodily injury; or

(3) Battery;

commits involuntary manslaughter."

/s/ Michael C. Keating
Attorney for Defendant

## DEFENDANT'S INSTRUCTION NO. 11

You are instructed that the offenses charged in Counts I, II and III also include the offense of Voluntary Manslaughter, which is defined as follows:

"(a) A person who knowingly or intentionally kills another human being while acting under sudden heat commits voluntary manslaughter.

(b) The existence of sudden heat is a mitigating factor that reduces what otherwise would be murder 1(1) to voluntary manslaughter."

/s/ Michael C. Keating
Attorney for Defendant



## DEFENDANT'S INSTRUCTION NO. 13

You have no right to find the defendant guilty only for the purpose of deterring others from committing crimes of this nature or for the purpose of discouraging the use of the defense of insanity.

/s/ Michael C. Keating
Attorney for Defendant

## DEFENDANT'S INSTRUCTION NO. 14

The circumstances of suspicion, no matter how grave or strong, are not evidence of guilt, and the accused must be acquitted unless the fact of his guilt is proved beyond every reasonable doubt to the exclusion of every reasonable hypothesis consistent with his innocence.

/s/ Michael C. Keating
Attorney for Defendant

## DEFENDANT'S INSTRUCTION NO. 15

The defendant, Thomas Schiro, has not taken the witness stand as a witness. His failure to do so shall not, in any manner, be considered by you in arriving at your verdict.

/s/ Michael C. Keating
Attorney for Defendant

## DEFENDANT'S INSTRUCTION NO. 17

The term "attempt" is defined as follows:

"A person attempts to commit a crime when, acting with the culpability required for commission of the crime, he engages in conduct that constitutes a substantial step toward the commission of the crime."

/s/ Michael C. Keating
Attorney for Defendant



## BROWN CIRCUIT COURT

(caption omitted in printing)

**VERDICT FORMS FROM GUILT PHASE**

We, the jury, find the defendant is not responsible by reason of insanity at the time of the death of Laura Luebbehusen.

_____ _____
Date Foreperson

We, the Jury, find the defendant guilty of Murder but mentally ill at the time of the death of Laura Luebbehusen.

_____ _____
Date Foreperson

We, the jury, find the defendant guilty of the Murder of Laura Luebbehusen as charged in Count I of the information.

_____ _____
Date Foreperson

We, the jury, find the defendant not guilty.

_____ _____
Date Foreperson

We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information.

9-12-81 /s/ William J. Yeager
Date Foreperson

We, the Jury, find the defendant guilty while the said Thomas N. Schiro was committing and attempting to commit the crime of criminal deviate conduct as charged in Count III of the information.

_____ _____

Date Foreperson

We, the jury, find the defendant guilty of the Murder of Laura Leubbenhusen in the included offense of Voluntary Manslaughter.

_____ _____

Date Foreperson

We, the jury, find the defendant guilty of the Murder of Laura Leubbenhusen in the included offense of Involuntary Manslaughter.

_____ _____

Date Foreperson

We, the jury, find the defendant guilty of the Murder of Laura Leubbenhusen in the included offense of Voluntary Manslaughter, but mentally ill.

_____ _____

Date Foreperson

We, the jury, find the defendant guilty of the Murder of Laura Leubbenhusen in the included offense of Involuntary Manslaughter, but mentally ill.

_____ _____

Date Foreperson



## BROWN CIRCUIT COURT

### DOCKET ENTRY OF SEPTEMBER 12, 1981

* * * And now the jury retires in charge of the bailiff of this Court to deliberate upon its verdict. And thereafter, in response to a request by the jury, and by the agreement of the parties, the jury is reread the Court's final instruction number six (6), and the defendant's final instructions numbered two (2) and three (3). And now the jury again retires in charge of the bailiff to deliberate upon its verdict. And, thereafter, the jury returns into open Court its verdict, which is in the following words and figures, to-wit: * * *

**VERDICT FORMS FROM PENALTY PHASE**

We, the jury, recommend the death sentence be imposed upon the Defendant, Thomas N. Schiro.

Dated: _____ _____

Foreperson

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

We, the jury, recommend that the death penalty not be imposed upon the Defendant, Thomas N. Schiro.

Dated: 9-15-81 /s/ William J. Yeager
Foreperson

/s/ Katherine Botts /s/ Darwin B. Esque

/s/ Phyllis Booher /s/ Patricia Thummel

/s/ Laura Ann Johnson /s/ Mary Jane Richards

/s/ Dennis Lee Blake /s/ Sharon K. Hubor

/s/ Ray Browning Jr. /s/ Kenneth M. Reynolds

/s/ Harold R. Sherrill



We, the jury, have no recommendation.

Dated: _____ _____

Foreperson

_____ _____

_____ _____

_____ _____

_____ _____

_____ _____

## TRIAL COURT'S ORIGINAL PRONOUNCEMENT OF SENTENCE

THE COURT: Now, this is the pronouncement of sentence. The Defendant having been found guilty by a jury on the twelth of September, 1981, and the Court having entered a judgment of conviction of the crime murder/rape, and on September 15, 1981, the Court having heard argument by Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana, and Michael Keating, for the Defendant, and both the State and counsel for Defendant having moved to incorporate the evidence of the trial, which motion was granted by the Court, and the jury having returned their unanimous recommendation to the Court that the death penalty not be imposed on the Defendant, and the Court having reviewed the evidence of the trial thereafter, and having considered the written Pre-Sentence Report, gives the following reasons for the imposition of the sentence: The jury in its verdict of guilty of Murder/Rape, rejected the plea of insanity. The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard Woods, M.D., both indicated that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community. David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant, submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense. The Defendant's own witness, a psychologist, Dr. Frank Osanka of Napierville, Illinois, who is a behaviorial consultant, in his sixty hours of review, by personal interviews and by tape with the Defendant, gave various illustrations which the Defendant had described of a wide range of deviate sexual behavior, including voyeurism, exhibitionism, sexual sadism, necrophelia, sexual telephone harassment and other disorders, all of which are aggravating circumstances, which far outweigh the mitigating circumstances. Among other things, the Defendant's Psychologist, Dr. Frank Osanka, indicated that the Defendant is "overpowered by the need for erotic release". Mary T. Lee, with whom the Defendant had lived, testified as to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T. Lee also testified that he had knocked out her front teeth with his fist. Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral palsy, and under threat of harm to said child. In her testimony she identified the Defendant, and Defendant's counsel had no questions and made no objections to her testimony. At no time has the Defendant indicated any remorse. These are aggravating circumstances. The fact that the Defendant committed these crimes with gruesome, sadistic acts, including necrophilia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught. This is an aggravating circumstance. The Defendant had been previously convicted of robbery, a Class C Felony, in Vanderburgh County and was on

work release when arrested for this crime. This is an aggravating circumstance. This Court personally observed the Defendant, while the jury was present, making continuing rocking motions, which did not stop throughout the trial, except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced the jury in its recommendation. The age of the Defendant is twenty years. This is not a mitigating circumstance, nor was the age of the victim, twenty-eight years, a mitigating circumstance. For all of the above reasons, the Court now sentences the Defendant to death. The sentence is required by the Statutes of the State of Indiana, as all of the aggravating circumstances listed herein by far outweigh any mitigating circumstances. The Court has no choice but to follow the law. The Defendant is to be executed as by law provided on the twenty-eighth day of January, 1982, before sunrise. The Defendant is remanded to the custody of the Sheriff. * * *



IN THE BROWN CIRCUIT COURT

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STATE OF INDIANA

v.

THOMAS N. SCHIRO

---

**NUNC PRO TUNC ENTRY**
**PRONOUNCEMENT OF SENTENCING**

The Defendant, Thomas N. Schiro, having been found guilty of Murder while committing and attempting to commit rape, by a jury on the 12th day of September, 1981, which verdict was: "We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information." William J. Yeager, Foreperson; dated September 12, 1981. The Court entered judgment of conviction of the said crime of Murder/Rape.

On September 15, 1981, the jury having been instructed to return, appeared. Present were Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana; the Defendant, Thomas N. Schiro, with his counsel, Michael Keating, and the members of the jury.

A hearing pursuant to Indiana Code 35-50-2-9 was held concerning the recommendation of sentencing. Both the attorney for the State and the attorney for the Defendant moved to incorporate the entire evidence of the trial. Said motion was granted by the Court. Arguments were made by the attorneys, instructions were read to the jury.

The jury, after due deliberation, returned unanimously with the recommendation that the death penalty not be imposed upon the Defendant, Thomas N. Schiro. The matter was set for sentencing on October 2, 1981.

On October 2, 1981, this Court having reviewed the evidence of the trial and having considered the written pre-sentence report, and having heard the arguments of counsel and the statement of the Defendant, gives the following reasons for the imposition of its death sentence.

These are the aggravating circumstances which the State has proved beyond a reasonable doubt. Under Indiana Code, Section 35-50-2-9, subsection [1] the Aggravating Circumstances alleged.

> (b) The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

1. The verdict of the jury on September 12, 1981, found the Defendant Thomas N. Schiro guilty of Murder while committing and attempting statutory rape.

2. The jury rejected the plea of insanity by its verdict.

Since aggravating circumstances were proven beyond a reasonable doubt, it remains to consider whether any mitigating circumstances exist and outweigh the aggravating circumstances.

As for mitigating circumstances, the Court finds none. Under Indiana Code § 35-50-2-9, subsection (c) the mitigating circumstances that may be considered under this section are as follows:

> (1) The defendant has no significant history of prior criminal conduct.
>
> (2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder.
>
> (3) The victim was a participant in, or consented to the defendant's conduct.



> (4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.
>
> (5) The defendant acted under the substantial domination of another person.
>
> (6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.
>
> (7) Any other circumstances appropriate for consideration.

The statute provides, as a mitigating circumstance, whether (1) the Defendant has no significant history of prior criminal conduct. The record in this case shows numerous instances of prior criminal conduct by the Defendant.

(a) David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense.

(b) The Defendant's witness, Mary T. Lee, with whom the Defendant had lived, testified as to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T. Lee also testified that he had knocked out her front teeth with his fist.

(c) Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral

palsy, and under threat of harm to said child. In her testimony she identified the Defendant, and Defendant's counsel had no questions and made no objections to her testimony.

(d) The Defendant had been previously convicted of robbery, a Class C Felony, in Vanderburgh County, Indiana, and was on work release when arrested for this crime.

(e) The Defendant's own witness, a psychologist, Dr. Frank Osanka of Napierville, Illinois, who is a behaviorial consultant, in his sixty hours of review, by personal interviews and by tape with the Defendant, gave various illustrations which the Defendant had described of a wide range of deviate sexual behavior, including voyeurism, exhibitionism, sexual sadism, necrophelia, sexual telephone harassment and other disorders.

Indiana Code § 35-50-2-9 provides two mitigating circumstances relating to Defendant's mental health:

> (2) The defendant was under the influence of extreme mental or emotional disturbance when he committed the murder,
>
> and
>
> (6) The defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(a) The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard A. Woods, M.D., both indicated that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury



and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community.

(b) The record indicated that the Defendant has no remorse and is violent and sadistic. The Defendant's Psychologist and own witness, Dr. Frank Osanka, indicates that the Defendant is "overpowered by the need for erotic release".

(c) The fact that the Defendant committed these crimes, as the record shows, with gruesome, sadistic acts, including necrophelia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught, and malice in the crime for which he has been convicted. This shows that he planned the crime and planned how to avoid its consequences, showing Defendant's appreciation for the wrongfulness of his conduct and the consequences of his actions. This shows that Defendant had unimpaired capacity to appreciate the criminality of his conduct and to conform his conduct to the requirements of the law.

(d) This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

The Statute also provides as a mitigating circumstance,

> (3) The victim was a participant in, or consented to, the defendant's conduct.

The victim obviously did not consent to being murdered. Defendant was also found guilty beyond a reason-

able doubt, of raping the victim, therefore the victim could not have consented to being raped.

The Statute also provides,

> (4) the Defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

There is no evidence of an accomplice in this record.

The Statute provides,

> (5) The defendant acted under the substantial domination of another person.

There is no evidence on this record that shows that any other person substantially dominated Defendant.

The Statute also requires the consideration of,

> (7) Any other circumstances appropriate for consideration.

The age of the Defendant is twenty years. The Court does not find this to be a mitigating circumstance.

Since the State proved "beyond a reasonable doubt the existence of at least (1) of the aggravating circumstances alleged", (Indiana Code § 35-50-2-9, Section 9(9)) and the Court finds no mitigating circumstances to outweigh it, the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.

The Defendant is to be executed, as by law provided, on the 28th day of January, 1982, before sunrise.

The Defendant is remanded to the custody of the Sheriff.

/s/ Samuel R. Rosen
SAMUEL R. ROSEN, Judge
Brown Circuit Court

Dated: October 2, 1981



# SUPREME COURT OF INDIANA

No. 1181S329

THOMAS N. SCHIRO,
*Defendant-Appellant,*

v.

STATE OF INDIANA,
*Plaintiff-Appellee.*

Aug. 5, 1983

PIVARNIK, Justice.

Defendant-appellant, Thomas N. Schiro, was convicted of Murder While Committing or Attempting to Commit Rape, Ind.Code § 35-42-1-1(2) (Burns Repl.1979), at the conclusion of a jury trial in Brown Circuit Court on September 12, 1981. The trial court sentenced Schiro to death. He now appeals.

Schiro raises seven errors on appeal, concerning:

1) whether the Indiana death penalty statute, Ind.Code § 35-50-2-9 (Burns Repl. 1979), is unconstitutional because it fails to provide for adequate review of death sentences;

2) whether the trial court erred in imposing the death penalty;

3) whether a statement given by Schiro was an involuntary custodial statement and should have been excluded from trial;

4) whether the master commissioner of Vanderburgh Circuit Court had authority to issue search warrants;

5) whether the trial court erred in excluding a letter written by the defendant on the issue of his insanity;

6) whether the trial court supplied the jury with all the necessary verdict forms; and,

7) whether the pre-sentence report contained improper information.

The evidence most favorable to the State reveals that the body of Laura Luebbehusen was discovered in her Evansville home on the morning of February 5, 1981. Laura's roommate, Darlene Hooper, and Darlene's ex-husband, Michael Hooper, discovered the body. Darlene had spent the previous night at Michael's apartment. The two found the home in great disarray, with blood covering the walls and floor. Laura's body was found near the door, her legs spread apart, and her slacks were pulled down around her ankles. The police were called and recovered a large broken vodka bottle, a handle and metal portions of an iron, a partially consumed bottle of wine, a pint bottle of vodka, and empty alcoholic beverage cans and bottles in the garbage.

Dr. Albert Venables testified as the pathologist who performed the autopsy on the victim. Dr. Venables found a number of contusions on the body but he stated that Laura Luebbehusen had been strangled to death. A number of wedge-shaped injuries on the head were most likely caused by a blunt instrument. Dr. Venables also found lacerations on one nipple and a thigh, and a tear in the vagina, all caused after the victim's death. A forensic dentist confirmed that the injury to the thigh was a human bite mark.

A few days after Laura Luebbehusen's body was discovered, her Toyota automobile was found about one block away from the Second Chance Halfway House. Defendant Schiro was a resident at the Halfway House, which tried to assist former criminals in finding employment and remove any obstacles that they face when released from prison. It also housed people who were sent there for treatment and counseling in lieu of sending them to prison from the local courts.



The director of the Halfway House, Ken Hood, asked a counselor to check the sign-in and sign-out sheets to see if any of the residents had been out at the time of the Luebbehusen murder. While the counselor was examining the sign-out sheets, Schiro approached him and asked if he could talk about something that was very "heavy." The counselor told Schiro to speak to Ken Hood. Schiro admitted to Hood that he had killed Laura Luebbehusen. Hood contacted the police and took Schiro down to the station.

Jimmy Wolff was Schiro's roommate at the Halfway House. Wolff testified that Schiro arrived at the room about 5:00 a.m., on February 5, 1981, the day Laura Luebbehusen's body was found. Schiro told Wolff he had to go downstairs and straighten things out so he would not get in trouble about being out all night.

After Schiro confessed to Ken Hood, the police searched his room and determined that the blood on a jacket found in the room was consistent with that of the victim, but not consistent with Schiro's blood. While in a holding cell in Vanderburgh County Jail, Schiro told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had intercourse with the victim before and after killing her.

Mary T. Lee, Schiro's girlfriend, testified that shortly after the murder was committed, Schiro visited her in Vincennes and admitted that he killed Laura Luebbehusen. Schiro told Lee that he gained entrance to the victim's home on the pretext that his car had broken down. After pretending to use the telephone to call for assistance, Schiro asked if he could use the bathroom. He came out of the bathroom exposed but told Laura not to be alarmed because he was "gay". This story Schiro made up in order to gain the victim's confidence. Schiro further told Luebbehusen that some "gay" friends had bet him that he could not "get it on" with a woman and he just wanted to win the bet. Schiro and Luebbe-

husen talked about homosexuality and Luebbehusen told Schiro that she, too, was "gay". Darlene Hooper, Luebbehusen's roommate, had testified earlier that Laura was a practicing lesbian and that she had an aversion to men.

Schiro roamed through the house and came back with two dildoes and had Luebbehusen try to insert one into his anus. He found the experience too painful and told Luebbehusen he would make love to her instead. A dildo, identified at trial as the one taken from the house, was recovered in Vincennes. Mary Lee told the police where Schiro had disposed of it after showing it to her. After intercourse, Luebbehusen tried to leave but Schiro stopped her, dragged her back into the bedroom, and raped her. During this time the two had been drinking. When the liquor ran out, they left to go buy more and returned to the house. Schiro fell asleep but woke up when Luebbehusen again attempted to leave. Schiro forced her to remain and she fell asleep on the bed. While Luebbehusen slept, Schiro felt the urge to kill her, grabbed the vodka bottle, and beat her on the head until the bottle broke. He then beat her with the iron and when she resisted his attack, finally strangled her to death. Schiro then dragged Luebbehusen into another room, undressed her, and sexually assaulted the corpse.

## I

Defendant Schiro's first argument concerns the constitutionality of the Indiana Death Penalty statute, Ind.Code § 35-50-2-9 (Burns Repl. 1979). Schiro states specically that the death penalty does not provide for any proportionality review of death sentences by this Court. According to Schiro, the term "proportionality review" requires that the sentence handed down by the trial court be compared to sentences imposed in similar circumstances. This, Schiro urges, would insure that the death penalty is not arbitrarily and capriciously applied. Since Ind.Code § 35-50-2-9 does not explicitly mandate this



form of review and this Court has allegedly failed to engage in such review, Schiro believes that the death penalty statute is unconstitutional.

Schiro admits that two recent cases have upheld the constitutionality of the Indiana death penalty statute. *Williams v. State* (1982) Ind., 430 N.E.2d 759, *appeal dismissed* (1982) —— U.S. ——, 103 S.Ct. 33, 74 L.Ed.2d 47; *Brewer v. State* (1981) Ind., 417 N.E.2d 889, *cert. denied* (1982) —— U.S. ——, 102 S.Ct. 3510, 73 L.Ed.2d 1384. *See also Judy v. State* (1981) Ind., 416 N.E.2d 95. Schiro also notes that the United States Supreme Court, in *Proffitt v. Florida,* (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913, found the Florida death penalty statute, which is nearly identical to our death penalty statute, to be constitutional. *Compare* Ind. Code § 35-50-2-9 (Burns Repl.1979) *with Fla.Stat.Ann.* § 921.141 (West Supp.1983). While conceding that the procedure under our statute may be constitutional, Schiro argues that the following passage from *Proffitt* indicates the Supreme Court's mandate of proportionality review in cases involving the death penalty:

> "The law differs from that of Georgia in that it does not require the court to conduct any specific form of review. Since, however, the trial judge must justify the imposition of death sentence with written findings, meaningful appellate review of each sentence is made possible, and the Supreme Court of Florida, like its Georgia counterpart, considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great.' *State v. Dixon,* 283 So.2d 1, 10 (1973)."

428 U.S. at 250-51, 96 S.Ct. at 2966, 49 L.Ed.2d at 922.

Although Schiro has not raised this argument, and without going into great detail, we feel it is incumbent to note that this Court has consistently held that the death penalty does not violate the ban against cruel and unusual punishment, Article 1, § 16 of the Indiana Constitution. *Brewer, supra,* 417 N.E.2d at 894; *Adams v. State,* (1971) 259 Ind. 64, 74, 271 N.E.2d 425, 430, and cases cited therein. Similarly, the United States Supreme Court has held that the death penalty does not violate the Eighth Amendment of the United States Constitution. *Gregg v. Georgia,* (1976) 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859; *Proffitt v. Florida,* (1976) 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913; *Jurek v. Texas,* (1976) 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929.

This Court has comparatively analyzed the Florida death penalty statute, approved in *Proffitt, supra,* and our own statute at great length. *Brewer, supra,* 417 N.E.2d at 897; *see also Judy v. State,* 416 N.E.2d at 107. Both statutes require the following prerequisites before a sentence of death may be imposed and executed:

"(1) A conviction of murder.

(2) A hearing for purposes of determining the sentence to be imposed, separate from the trial at which the issue of guilt was determined.

(3) In jury trials, a finding, by the jury, of at least one (1) of the aggravating circumstances enumerated in the statute.

(4) In jury trials, a finding, by the jury, that mitigating circumstances, if any, are outweighed by the aggravating circumstances.

(5) In jury trials, a recommendation by the jury, as to whether or not the death penalty should be imposed.

(6) A finding by the trial court of at least one (1) of the aggravating circumstances enumerated in the statute.



(7) A finding by the trial court that mitigating circumstances, if any, are outweighed by the aggravating circumstances.

(8) The completion, prior to carrying out the sentence, of an automatic expedited review of the imposed sentence by the Supreme Court of the State."

*Brewer,* 417 N.E.2d at 897.

We also felt in *Brewer* that Indiana is more restrictive than Florida in applying the death penalty. Indiana law requires that the sentencing hearing be before the same jury that tried the guilt issue, whereas Florida may, under certain circumstances, impanel a special jury for the hearing. *Id.* at 898. The standard of proof for a finding of at least one of the aggravating circumstances is beyond a reasonable doubt in Indiana, while Florida does not require a specified standard of proof. *Id.*

Still, regardless of the above distinctions, defendant Schiro would argue that under *Proffitt,* Indiana does not engage in a meaningful appellate review of death sentences. We disagree.

We interpreted the United States Supreme Court's holding in *Gregg v. Georgia, supra,* a companion case to *Proffitt,* to be that the death penalty may be applied ". . . if the circumstances of the offense and the character of the offender both warrant and if the procedures followed in making the determination are such as reasonably to assure that it was not done arbitrarily or capriciously." *Brewer, supra,* 417 N.E.2d at 897.

It is clear that the imposition of the death sentence under Ind.Code § 35-50-2-9 is based upon the nature and circumstances of the crime and the character of the offender being sentenced. *Judy, supra,* 416 N.E.2d at 105. Also, this Court has adopted a rule wherein it has exclusive jurisdiction of criminal appeals from judgments or sentences imposing death, life imprisonment, or a minimum sentence of greater than ten years. Ind.R.App.P.

4(A)(7). Therefore, because of statewide jurisdiction over most criminal cases, and always over cases involving the death penalty or life imprisonment, we are confident that through continuous and exclusive review of such cases, no sentence of death will be freakishly or capriciously applied in Indiana.

In addition, rules adopted by this Court govern the appellate review of sentences:

> "Rule I
>
> AVAILABILITY—COURT
>
> (1) Appellate review of the sentence imposed on any criminal defendant convicted after the effective date of this rule is available as this rule provides.
>
> (2) Appellate review of sentences under this rule may not be initiated by the State.
>
> (3) The Supreme Court will review sentences imposed upon convictions appealable to that Court; the Court of Appeals will review sentences imposed upon convictions appealable to the Court of Appeals.
>
> Rule 2
>
> SCOPE OF REVIEW
>
> (1) The reviewing court will not revise a sentence authorized by statute except where such sentence is manifestly unreasonable in light of the nature of the offense and the character of the offender.
>
> (2) A sentence is not manifestly unreasonable unless no reasonable person could find such sentence appropriate to the particular offense and offender for which such sentence was imposed."

Ind.R.App.Rev.Sen. 1 and 2.

In all cases involving the finding of aggravating circumstances, the sentencing judge must include a statement of the reasons for selecting the sentence he imposes.



This enactment, Ind.Code § 35-4.1-4-3 (§ 35-50-1A-3) (Burns Repl.1979), reads as follows:

> "SENTENCING HEARING IN FELONY CASES.—Before sentencing a person for a felony the court must conduct a hearing to consider the facts and circumstances relevant to sentencing. The person is entitled to subpoena and call witnesses and otherwise to present information in his own behalf. The court shall make a record of the hearing, including:
>
> (1) A transcript of the hearing;
>
> (2) A copy of the presentence report; and
>
> (3) If the court finds aggravating circumcumstances or mitigating circumstances a statement of the court's reasons for selecting the sentence that it imposes."

The above statute insures that in all instances where the death penalty is applied, the trial court judge must submit written findings indicating the aggravating factors he found to be present in imposing a sentence of death. This will guard against the influence of improper factors at the trial level and will make sure that the evils of *Furman v. Georgia*, (1972) 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, "arbitrary and capricious application" of the death penalty, were not present in the sentencing decision.

Not only do the trial judge's written findings facilitate meaningful appellate review, this review is guaranteed to be thorough and adequate since we have before us the entire record of the proceedings, not just the sentencing hearing. *Brewer, supra*; *Judy, supra*. Thus, examination of the record, plus the sentencing hearing and the trial court's findings, protects each individual's constitutional rights.

Therefore, because of procedure mandated by statute, codified by rules, and controlled by cited precedent,

". . . this Court can then meaningfully and systematically review each case in which capital punishment has been chosen, in light of other death penalty cases. Mandatory review by this Court, in each case, of the articulated reasons for imposing the death penalty, and the evidence supporting those reasons, assures 'consistency, fairness, and, rationality in the evenhanded operation' of the death penalty statute. *Proffitt v. Florida, supra,* 428 U.S. at 259-60, 96 S.Ct. at 2970, 49 L.Ed.2d at 927. *See Gregg v. Georgia,* (1976) 428 U.S. 153, 194-95, 96 S.Ct. 2909, 2935, 49 L.Ed.2d 859, 886-87. *Cf. Woodson v. North Carolina,* [428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944], *supra*; *French v. State,* [266 Ind. 276, 362 N.E.2d 834], *supra.* The guidelines and procedures established by our constitution, statutes, and rules thus permit an 'informed, focused, guided, and objective inquiry' by all concerned into the appropriateness of capital punishment in a given case. Therefore, we find our death sentencing procedures to be consistent and in full compliance with those required by the United States Supreme Court in *Gregg v. Georgia* and *Proffitt v. Florida,* and thus not violative of the Eighth and Fourteenth Amendments to the United States Constitution."

*Judy, supra,* 416 N.E.2d at 108.

We find no constitutional infirmities in the death penalty statute nor in the review that automatically follows the imposition of such sentence.

II

The next issue concerns the trial court's imposition of the death penalty. Defendant Schiro's argument may be divided into four sub-categories:



A. Whether Ind.Code § 35-50-2-9 permits a trial court to override a jury's recommendation that the death penalty not be imposed;

B. Whether the procedure established by Ind.Code § 35-50-2-9 places a defendant in double jeopardy;

C. Whether the imposition of the death penalty failed to conform to Ind.Code § 35-50-2-9; and,

D. Whether this Court, after reviewing the case at hand, should vacate the sentence of death.

A.

Schiro's first dispute is with the following language found in Ind.Code § 35-50-2-9:

> "(e) If the [death penalty] hearing is by the jury, the jury shall recommend to the court whether the death penalty should be imposed.
>
> * * * *
>
> (2) . . .
>
> The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation."

Schiro argues that the use of the word "whether" indicates that the sole purpose of the jury at the death penalty hearing is to render a recommendation of death only if it is justified under the facts. The legislative intent would make a jury recommendation of *no* death penalty binding upon the trial court. If the jury did recommend a sentence of death, the legislature also intended that the trial court could behave as a safety valve by overriding such a recommendation and imposing a sentence of years. Thus, Schiro argues, while a trial court may override a

recommendation of death, it may not impose the death penalty if the jury holds otherwise.

We wrote in *Foremost Life Ins. Co. v. Dept. of Ins.*, (1980) Ind., 409 N.E.2d 1092, 1095-96:

> "In interpreting a statute we are to ascertain and give effect to the intent of the legislature. *State ex rel. Baker v. Grange*, (1929) 200 Ind. 506, 510, 165 N.E. 239, 240; *Ervin v. Review Bd.*, (1977) Ind.App. [173 Ind.App. 592], 364 N.E.2d 1189, 1192; *Abrams v. Legbrandt*, (1974) 160 Ind.App. 379, 388, 312 N.E.2d 113, 118; *Marhoefer Packing Co. v. Indiana Dept. of State Revenue*, (1973) 157 Ind.App. 505, 516, 301 N.E.2d 209, 214.
>
> In determining the legislative intent, the language of the statute itself must be examined, including the grammatical structure of the clause or sentence in issue. . . . Further, a statute is to be examined and interpreted as a whole, giving common and ordinary meaning to words used in English language and not overemphasizing a strict literal or selective reading of individual words. *Combs v. Cook*, (1958), 238 Ind. 392, 397, 151 N.E.2d 144, 147; *Abrams v. Legbrandt, supra*."

The American Heritage Dictionary (1971 ed.) in its definition of "whether" says the word is "[u]sed in indirect questions to introduce one alternative: *We should find out whether the museum is open.*" Using the accepted definition of "whether", we find that under Ind.Code § 35-50-2-9, the jury is mandated to make a choice between the death penalty or no death penalty. Therefore, Schiro's argument, that the statute only allows the jury to recommend the death penalty, fails, and because of this, his assertion that the trial court may only reject death penalty recommendations also fails. We should also note that Schiro's premise (a recommendation against the death penalty is binding upon the trial court) thwarts legislative



intent. Ind.Code § 35-50-1-1 (Burns Repl.1979) abolished the jury's role in determining or setting a sentence. *Debose v. State*, (1979) 270 Ind. 675, 676, 389 N.E.2d 272, 273. If we accept Schiro's argument, the trial court would be severely limited in imposing sentence under Ind. Code § 35-50-2-9 whenever a jury voted against the death penalty. Under the defendant's reasoning, the trial court would have no choice but to impose a term of years. Such action goes against the legislative intent of removing the jury's role in sentencing defendants. The jury plays an advisory role under Ind.Code § 35-50-2-9(e) and the trial court may properly override a jury's recommendation.

B

Schiro next argues that he was placed in double jeopardy because the trial court ignored the jury's recommendation and sentenced him to death. Having been given the chance to seek the death penalty before the jury, the State, Schiro urges, should not be given a second chance to litigate the same issues before the trial court. Schiro cites *Bullington v. Missouri*, (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 in support of his position.

The Double Jeopardy Clause of the Fifth Amendment provides,

> ". . . that no person shall 'be subject for the same offense to be twice put in jeopardy of life or limb.' The Double Jeopardy Clause was made applicable to the states through the Fourteenth Amendment in *Benton v. Maryland*, (1969) 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707. The Clause has been held to embody three separate but related prohibitions: (1) a rule which bars a reprosecution for the same offense after acquittal; (2) a rule barring reprosecution for the same offense after conviction, and; (3) a rule barring multiple punishment for the same of-

fense. *North Carolina v. Pearce*, (1969) 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656."

*Elmore v. State*, (1978) 269 Ind. 532, 533-34, 382 N.E.2d 893, 894.

Defendant Schiro's reliance on *Bullington, supra*, is misleading. Missouri law explicitly requires the jury, not the trial court, to impose the death penalty in cases tried before a jury. Mo.Ann.Stat. § 565.006 (Vernon 1979). This involves a bifurcated proceeding where, after the defendant is convicted, the prosecution offers evidence in support of the death penalty. This hearing must be held before the same jury that convicted the defendant of murder. The jury must find at least one aggravating circumstance beyond a reasonable doubt and put its findings in writing. A jury's decision to impose the death penalty must be unanimous; if it cannot reach a decision, the alternative sentence of life imprisonment is imposed.

In *Bullington*, the defendant was convicted of murder but the jury fixed his punishment at life imprisonment. While the defendant's motion for a new trial or judgment of acquittal was pending, the United States Supreme Court decided *Duren v. Missouri*, (1979) 439 U.S. 357, 99 S.Ct. 664, 58 L.Ed.2d 579. That case held that the Missouri law allowing women to be exempted from jury duty deprived a defendant of his right under the Sixth and Fourteenth Amendments to a jury drawn from a fair cross-section of the community. The trial court, relying on *Duren*, granted a new trial for defendant Bullington.

Defendant was again convicted of murder and the State sought the death penalty. The United States Supreme Court held that the second seeking of the death penalty, under the Missouri statute, violated the proscription against double jeopardy. The bifurcated proceeding requires the jury to determine whether the prosecution has proved its case. Analogizing the first jury's decision to impose life imprisonment to that of an acquittal (i.e., the



jury could not find an aggravating circumstance beyond a reasonable doubt sufficient to impose a death sentence), and holding, of course, that an acquittal is absolutely final, the Supreme Court wrote that the prosecution is not entitled to another chance at the death penalty. 451 U.S. at 446, 101 S.Ct. at 1861-62, 68 L.Ed.2d at 283.

As the facts illustrate, *Bullington* was a unique decision that is clearly distinguishable from the situation presented here. Prior decisions held that the Double Jeopardy Clause did not prohibit the imposition of a harsher sentence on retrial, *North Carolina v. Pearce, supra*, but Bullington found an exception to that rule. The Supreme Court ruled that the Missouri sentencing hearing had the hallmarks of a trial on guilt or innocence. All issues are decided, reduced to written findings, and made binding since the jury's decision is the final determination of the sentence. In Indiana, the jury does not make a final determination of the sentence. It only releases an opinion of its recommendation, not an ultimate determination.

Schiro also argues that the jury's recommendation shows that the State failed to prove an aggravating circumstance beyond a reasonable doubt. This is not necessarily so. The statute does not require the jury to list its reasons for the recommendation. It could well be that a jury found the aggravating circumstance to be present, but felt it was outweighed by mitigating circumstances. The judge's determination is based on the same standards as the jury's recommendation and he determines whether the aggravating circumstances has been proved beyond a reasonable doubt. His findings are put in writing so that we may adequately review them on appeal. The judge's determination was the completion of a single trial process of which the jury recommendation was only an intermediate stage. We find no error in the procedure used by the trial court in rejecting the jury's recommendation.

C

The original findings in this action did not set out clearly and properly the trial court's reasons for imposing the death penalty. We ordered the trial court to make written findings in this case, setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified in Ind.Code § 35-50-2-9. At the same time we afforded defendant Schiro the opportunity to file a brief contesting the *nunc pro tunc* entry of the trial court. The State was given the opportunity to oppose the defendant's brief. In the brief, Schiro argues that the *nunc pro tunc* entry is inappropriate; that he has been twice placed in jeopardy; and that the *nunc pro tunc* entry does not comply with Ind.Code § 35-50-2-9.

The State counters Schiro's first argument by contending that the *nunc pro tunc* entry simply restates the trial court's findings so that they conform with the requirements of Ind.Code § 35-50-2-9. A *nunc pro tunc* entry is

> "'an entry made now of something which was actually previously done, to have effect as of the former date.' *Perkins v. Hayward*, (1892) 132 Ind. 95, 31 N.E. 670. Such entries may provide a record of an act or event of which no reference at all is made in the court's order book, as was the case in *Neuenschwander v. State*, (1928) 200 Ind. 64, 161 N.E. 369, and *Warner v. State*, (1924) 194 Ind. 426, 143 N.E. 288, or they may serve to change or supplement an entry already existing in the order book as was the case in *Apple v. Greenfield Banking Co.*, (1971) 255 Ind. 602, 266 N.E.2d 13, and *Perkins v. Hayward*, *supra*. Such entries must be based upon written memoranda, notes, or other memorials which (1) must be found in the records of the case; (2) must be required by law to be kept; (3) must show action taken or orders or rulings



> made by the court; and (4) must exist in the records of the court contemporaneous with or preceding the date of the action described. *Blum's Lumber & Crating, Inc. v. James et al.*, and *State ex rel. Baertich v. Perry County Council et al.*, (1972) 259 Ind. 220, 285 N.E.2d 822; *O'Malia v. State*, (1934) 207 Ind. 308, 192 N.E. 435; *Schoonover v. Reed*, (1879) 65 Ind. 313; *Pittsburgh etc. R. Co. v. Lamm*, (1916) 61 Ind.App. 389, 112 N.E. 45."

*Stowers v. State*, (1977) 266 Ind. 403, 410-11, 363 N.E.2d 978, 983. There has been precedent for *nunc pro tunc* entries in death penalty cases. In *Judy v. State*, *supra*, the record of the proceedings did not contain the written findings required in death penalty cases. The case was remanded and the trial court was instructed to enter written findings made *nunc pro tunc* effective the date of the sentencing hearing. Such actions are also common in cases involving enhanced sentences where the trial court does not comply fully with the mandate of *Gardner v. State*, (1979) 270 Ind. 627, 388 N.E.2d 513. *See e.g., Alleyn v. State*, (1981) Ind., 427 N.E.2d 1095. We request this specificity upon review so that

> "we [may] fulfill our responsibility to review the trial court's exercise of its judicial discretion. The trial court's statement is important also because it further serves to enlighten the defendant and the community as to the trial court's reasons for the imposition of an enhanced sentence, thereby greatly bolstering the public's confidence in the fairness and justice of our State's judicial process."

*Spinks v. State*, (1982) Ind., 437 N.E.2d 963, 968.

In a recent case, *Eddings v. Oklahoma*, (1982) 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1, the United States Supreme Court remanded a death penalty case to the Oklahoma Court of Criminal Appeals. The trial court

had refused to consider, as a matter of law, the defendant's character and record of family history as a possible mitigating factor. The Supreme Court ruled that this was error and vacated the death sentence but at the same time remanded the case to the Oklahoma courts. It was made very clear that the Supreme Court would not weigh this evidence of family background; that was the role for the Oklahoma courts. Thus, the death penalty could be reinstated on remand if the Oklahoma courts found that the defendant's background was not sufficient to outweigh imposition of the death sentence.

We also found it proper to remand this cause and order the trial court to comply fully with the death penalty statute. We did not demand a new decision; instead, we simply requested that the trial court provide its reasons for the harsher sentencing and these particular findings must be in the proper form. Only when we adequately review the imposition of the death sentence. Ind.Code § 35-50-2-9 lists only nine aggravating circumstances which may be used in seeking the death penalty. In this case, it appears that the trial court listed wrongly as aggravating circumstances its counter-arguments to any possible mitigating circumstances available to the defendant. Thus, to ensure fairness to both sides, and to make certain that proper considerations were utilized by the trial court in imposing sentence, we felt that remanding the case so that the written findings conform with the death penalty statute was the proper remedy.

In support of his double jeopardy argument, defendant Schiro again cites *Bullington, supra,* Issue IIB. Without going into great detail, we determined above that *Bullington* is not controlling on this matter. Here a judgment of death had been entered. All we requested was that the trial court put its findings in the proper form. No new determination of sentence was made, no new evidence was presented, and no reweighing of the facts took place. We fail to see how double jeopardy attached by



remanding this cause for compliance with Ind.Code § 35-50-2-9.

Finally, Schiro argues that the *nunc pro tunc* does not comply with Ind.Code § 35-50-2-9 for two reasons: first, the trial court did not take the jury's recommendation into consideration; and, second, that the trial court did not exercise any discretion but instead felt that the death sentence had to be mandatorily imposed.

Ind.Code § 35-50-2-9(e) reads that the "[trial] court shall make the final determination of the sentence, after considering the jury's recommendation. . . ." Schiro insists that the trial court failed to do this. An examination of the *nunc pro tunc* entry, however, reveals just the opposite. The trial court specifically stated that the jury had unanimously recommended that the death penalty not be imposed. Thus, the trial court was aware and cognizant of the jury's recommendation. Later, the trial court stated that the defendant continually "rocked" only in the jury's presence, and that this "fact may well have influenced and misled the jury in its recommendation." It is evident that the trial court did consider the jury's recommendation.

Schiro also takes issue with a passage in the *nunc pro tunc* entry. After carefully weighing all the mitigating circumstances, the trial court stated that "the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law." Schiro argues that this makes for a mandatory imposition of the death penalty.

The imposition of a mandatory death penalty is contrary to constitutional considerations. *Woodson v. North Carolina,* (1976) 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944; *French v. State,* (1977) 266 Ind. 276, 362 N.E.2d 834. The entire *nunc pro tunc* entry illustrates that the trial court felt that the requirements of the law, which calls for the death penalty only after strict consideration of all possible mitigating circumstances, had

been satisfied. Perusal of the record shows that after careful consideration, the death penalty was deserved and justified. The language of the trial court may appear awkward but nowhere has the trial court or this Court attempted to apply anything resembling a mandatory death penalty. The *nunc pro tunc* entry complies with Ind.Code § 35-50-2-9.

D

In this last sub-paragraph of Issue II, Schiro urges this Court to overturn the death penalty. The main basis for this contention is that the trial court rejected the jury's recommendation that no death penalty be imposed. Schiro believes this Court should impose a stricter standard of review in situations where the trial court and jury disagree about the imposition of a sentence of death.

It is true that in *Gregg v. Georgia, supra,* the United States Supreme Court spoke of the important society function fulfilled by jury sentencing. 428 U.S. at 181-82, 96 S.Ct. at 2929, 49 L.Ed.2d at 879. But on the same day, in a companion case, *Proffitt v. Florida, supra,* the Supreme Court pointed out that it

> "has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced at sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases."

428 U.S. at 252, 96 S.Ct. at 2966, 49 L.Ed.2d at 923.

In Issue I, we discussed the great care and scrutiny that goes into the review of all death penalty cases. While we agree that a jury plays a very important and necessary role in our judicial system, we are loath to institute a higher degree of scrutiny in situations where the trial



court and jury disagree about the imposition of the death penalty. Trial courts are presumed to know and understand the law. We have as great a confidence in the trial court's function in our judicial system as we do in the function of the jury. It may be that a jury which is to be involved in a capital case only once would be reluctant to impose this most severe form of punishment. This is not to say that all juries would be reluctant to do so, nor that trial courts are more callous and more inclined to impose a sentence of death. Rather, the trial court, with more experience in the criminal system, has better knowledge with which to compare the facts of this case with that of other criminal activity. This should result in greater consistency in sentencing. Furthermore, this Court, using the existing standards for appellate review of sentences, will ensure that the death penalty is not imposed where it is unreasonable to do so. We will not engage in a different standard of review where jury and trial court disagree.

After disposing of the defendant's four separate subcategories, we now turn to examine whether the sentence of death is appropriate. The transcript of the sentencing hearing and the trial court's written findings show that the court found that Schiro intentionally killed Laura Luebbehusen while committing or attempting to commit rape. After examining the record, we agree with the trial court's findings. Mary Lee and Dr. Frank Osanka recounted the events as told to them by Schiro. Schiro saw the victim a couple of times prior to the day of the murder. He made up his mind that he would rape her and perform his "ritual." After work, Schiro pretended that his car broke down and thus gained access to Luebbehusen's apartment by requesting assistance. Once inside, Schiro persuaded her that he was homosexual but they eventually had intercourse. Dr. Osanka said he was not certain but he was almost positive that the victim was coerced into such activity. Schiro then attempted to get

the victim in a comatose or drowsy state by having her consume alcohol and pills. One of his fantasies was to work in a funeral parlor and make love to the bodies of dead women. Sometime during this process Schiro fell asleep but awakened when the victim tried to escape. He grabbed her, pulled her back in, and raped her. Later they left to purchase some alcohol and then returned, at which time Schiro raped the victim again.

Schiro fell asleep on the couch but awoke when the victim again tried to escape. This time Luebbehusen was fully dressed. Schiro forced her to lie down on the bed beside him. He believed that she fell asleep or passed out. At that point he decided to kill her. Grabbing a vodka bottle, he smacked it against her head and it broke. Luebbehusen started to protest but Schiro grabbed an iron and continued to beat her. Finally, he grabbed the victim around the neck and strangled her. Schiro then began his "ritual." He dragged the corpse into another room, undressed it, and sexually and sadistically assaulted it.

As for the mitigating factors, the trial court did not find any. The court found that the defendant had been engaged in numerous instances of prior criminal conduct. Psychiatrists testified to Schiro's numerous rapes and other criminal deviate conduct. Mary Lee testified about Schiro's sadistic assaults on her child. Another witness testified that Schiro raped her in the presence of her child. Although the defendant related instances of sexual perversion, sadism, necrophilia, exhibitionism, and voyeurism, both of the court-appointed psychiatrists felt that Schiro was in good contact with reality. Both men testified that Schiro was not insane, showed no remorse, was violent and sadistic, and both thought him to be a danger to the community.

The trial court said the defendant attempted to conceal his crime, thereby showing his appreciation for the wrongfulness of his conduct. The court also thought Schiro



tried to delude the jurors into thinking he was mentally unstable by rocking back and forth only in their presence. The trial court failed to find that Schiro's age, twenty years, was a mitigating factor.

We find that with the submission of the *nunc pro tunc* entry the trial court properly followed the required procedures in imposing the death sentence. The record justifies the finding of the aggravating circumstances that Thomas Schiro intentionally killed Laura Luebbehusen. Although the record shows that Schiro engaged in bizarre sexual perversions at an early age and for some length of time, we also find that the evidence, as attested to by psychiatrists, indicated he could have conformed his conduct to the law. Such pitiful behavior should not serve as an excuse for the atrocious acts in this matter. The facts in the record, which show the horrifying nature of this rape/murder and the character of this offender, and the compliance of the trial court with the procedures of Ind. Code § 35-50-2-9, lead us to conclude that the death penalty was not arbitrarily or capriciously applied, and is reasonable and appropriate. The trial court is affirmed in the imposition of the death penalty.

## III

Schiro argues on appeal that the statement he gave to Ken Hood, in which he admitted killing Laura Lubbehusen, should have been suppressed at trial. He claims that his confession was the result of a custodial interrogation and Ken Hood failed to give *Miranda* warnings prior to Schiro's statement. Schiro also argues that the illegal statement taints all evidence seized as a result of his confession. Such evidence would include Mary Lee's testimony because the police were directed to her through the statement, and objects taken from Schiro's room. Schiro feels that this evidence should have been excluded from the trial.

*Miranda* warnings, *Miranda v. Arizona*, (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, do not have to be given in all interrogations. In *Johnson v. State*, (1978) 269 Ind. 370, 375-76, 380 N.E.2d 1236, 1240, this Court wrote:

> "It is settled that the procedural safeguards of *Miranda* only apply to what the United States Supreme Court has termed 'custodial interrogation.' *Oregon v. Mathiason* (1977) 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714; *Bugg v. State*, (1978) Ind., [267 Ind. 614] 372 N.E.2d 1156, 1158. Custodial interrogation refers to questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Mathiason, supra*, 429 U.S. at 494, 97 S.Ct. at 711, 50 L.Ed.2d at 719. The concept of custodial interrogation does not operate to extend the *Miranda* safeguards to spontaneous voluntary statements, i.e. statements which are either not made in response to questions posed by law enforcement officers while the defendant is in custody, *Bugg v. State, supra*, or statements which are made before the officers are given an opportunity to administer the *Miranda* warnings. *New v. State* (1970) 254 Ind. 307, 259 N.E.2d 696."

Schiro argues that Ken Hood was a law enforcement officer who interrogated him in Hood's office. The State strongly argues that Hood, as director of the Second Chance Halfway House, was not a law enforcement officer and no interrogation took place. Both parties have cited other jurisdictions in support of their view on Hood's law enforcement status. We do not find it necessary to determine whether Hood was a law enforcement officer, although Hood stated that he had no ties to any law enforcement agency, was not a sworn peace officer, and was not responsible for the investigation of any criminal activity. From the facts presented in this case, our first point of inquiry is to determine whether a "custodial interrogation" took place. Cases from both the United States Supreme Court and this Court have stated that *Miranda, supra*, does not apply outside the inherently coercive custodial interrogation for which it is designed. *Roberts v. United States*, (1980) 445 U.S. 552, 560, 100 S.Ct. 1358, 1364, 63 L.Ed.2d 622, 631; *Smith v. State*, (1981) Ind., 419 N.E.2d 743, 747. We examine all the facts to determine whether custodial interrogation took place.



A perusal of the record covering the suppression hearing and Hood's testimony at trial reveals the following: On the day in question, Schiro approached his work release counselor, a Mr. Williamson, and said that he had something "heavy" to discuss. Williamson was busy checking the sign-in, sign-out sheets to see whether any of the residents were out of the building during the time Laura Lubbehusen was murdered. Williamson was doing this under Hood's direction. Hood stated that while he did not think any of the residents were involved in the murder, he was afraid adverse publicity might arise because the victim's car was found near the Second Chance Halfway House. Therefore, he wanted to counter any possible bad publicity by showing that all the residents were in the facility when the crime occurred. Williamson thought Schiro's problem concerned his alcoholism and said that if it was serious, Schiro should go see Hood. Williamson called Hood and told him Schiro was on his way to discuss a problem.

Hood stated that he and the staff are strictly concerned in treating the individual resident's problems. In fact, Schiro had been in his office earlier that day and they discussed transferring him to another facility where Schiro could receive better treatment for his drinking problem. When Schiro arrived, Hood said he seemed nervous and upset but did not appear to be under the influence of

alcohol or drugs. After ascertaining that Schiro's alcoholism was not the reason for his converation, Hood started asking Schiro general questions. Hood felt that Schiro wanted to talk but appeared uncertain as to what he wanted to discuss. Hood thought that some general questions might calm him down. Although Hood said every indication was against it, he finally asked Schiro if he drove the victim's car and parked it near the facility. When Schiro nodded affirmatively, Hood told him he did not believe him because the records indicated that Schiro had been in the facility when the crime took place. Schiro said that the night watchman or manager had falsified the sign-in sheet. Still disbelieving, Hood asked some more questions about the murder. When Schiro mentioned that he worked near the victim's apartment, and Hood knew this to be true, Hood finally believed Schiro was responsible for the murder. Flabbergasted, Hood telephoned a judge for assistance. Schiro's attorney was in the judge's chambers and told Schiro to avoid saying anything about the crime. Hood then escorted Schiro to the police station.

We do not find that these facts show a custodial interrogation took place. Schiro voluntarily wanted to talk to someone about this crime. He was not the object of suspicion by Hood or anyone else, and Hood was only talking to Schiro upon Schiro's request. Schiro argues that under the rules of the facility, he could not leave unless he signed out on authorized business. Thus, he feels that he was in custody anywhere in the building. Hood stated that the residents could move about the facility at their leisure, stroll the grounds, and one door was always left unlocked. Regardless, Hood also said that he was not keeping Schiro in his office and he was free to leave at any time. Schiro was never placed in physical custody or restrained in any way. Schiro approached Hood, not vice versa. We fail to see that Schiro was coerced, either blatantly or inherently, into making a confession. There was no need for Miranda warnings from Hood.



Due to the disposition of the above issue, we also hold that Schiro's confession does not taint all evidence seized as a result of his statement. Therefore, Mary Lee's testimony and evidence taken from Schiro's room were properly admitted at trial.

## IV

Defendant Schiro argues that the search warrant issued by Maurice O'Connor, acting as Master Commissioner of the Vanderburgh Circuit Court, is invalid due to this Court's decision in *State ex rel Smith v. Starke Circuit Court*, (1981) Ind., 417 N.E.2d 1115. Due to the alleged defective nature of the search warrant, which was State's Exhibit 45, Schiro argues that all evidence seized because of the search warrant, such as his blood-stained coat, should not have been introduced at trial.

Defendant Schiro is in error on this issue. *State ex rel. Smith v. Starke Circuit Court* dealt with statutes providing for appointment of commissioners by circuit courts of Starke, Vanderburgh, and St. Joseph counties. The opinion was handed down on March 23, 1981, and we held that the holding shall have only prospective application and shall apply to or affect only those cases which had not yet reached final judgment or had not yet had a ruling on the motion to correct errors. *Id.*, 417 N.E.2d at 1124. The search warrant in this cause was issued in February, 1981, and the trial began in September, 1981; therefore, Schiro is correct in stating that his pending trial fell within the ambit of the opinion's prospective application. However, we declared only the following sections to be unconstitutional: Ind.Code § 33-4-1-74.4(b); 33-4-1-82.2 (b); and 33-4-1-75.1(c) (Burns Supp.1980). Those sections gave the master commissioner power to exercise full jurisdiction over any probate matters, civil matters, or criminal matters, but we did not hold the power to issue search warrants to be unconstitutional. The statute for Vanderburgh county states in pertinent part that the

"master commissioner may conduct preliminary hearings in criminal matters and issue search warrants and arrest warrants and fix bond thereon, and he may enforce court rules." Ind.Code § 33-4-1-82.2(a) (Burns Supp.1982). The search warrant was properly issued and evidence seized was properly introduced at trial.

V

Dr. Walter Abendroth was called by the State to testify about defendant Schiro's mental state. Dr. Abendroth had been treating Schiro prior to the murder. Most of this treatment dealt with Schiro's problem with alcohol and drugs. On cross-examination, the defense attempted to introduce a letter, allegedly written by Schiro, which Mary Lee delivered to Dr. Abendroth. The State objected on lack of foundation of Abendroth's ability to authenticate the letter as one written by Schiro. The trial court sustained the objection. Defendant Schiro argues that the objection should have been overruled because the exhibit was relevant, material, and competent evidence, and was not in violation of any rules of evidence.

In the appellate brief, Schiro also argues that the letter should have been admitted because a plea of insanity "opens wide the door to all evidence relating to the defendant and his environment." *Wilson v. State,* (1966) 247 Ind. 454, 461, 217 N.E.2d 147, 151. This is true but exhibits must be sufficiently identified to be admissible in evidence. *D.H. v. J.H.,* (1981) Ind.App., 418 N.E.2d 286; *Leslie v. Ebner,* (1918) 67 Ind.App. 32, 118 N.E. 829. A letter alleged to have been received from a particular source is not admissible until its authenticity, identity, and genuineness have been sufficiently shown. 13 I.L.E. *Evidence* § 163 (1959); 29 Am.Jur.2d *Evidence* § 879 (1967).

Dr. Abendroth said he could recognize Schiro's handwriting, probably because he received three or four prior letters from Schiro, but never explained how he knew the



letters were actually written by Schiro. Defense counsel never asked Abendroth if he saw Schiro write the letters or if Schiro personally delivered them and said they were written by him. This lack of authentication was the basis for the trial court sustaining the objection to the letter's introduction. Mary Lee, not Schiro, delivered the letter to Dr. Abendroth. Due to this fact, defense counsel could have had Mary Lee authenticate the letter when she testified later in the trial, but defense counsel failed to do this. We find that in addition to the lack of authenticity, any alleged error on this issue has been waived because defense counsel failed to resubmit the evidence when Mary Lee took the stand.

VI

When the jurors were ready to begin their deliberations, the trial court gave them the following verdict forms:

1) Guilty of Murder as charged in Count I
2) Guilty of Murder Rape as charged in Count II
3) Guilty of Murder Deviate Conduct as charged in Count III
4) Guilty of Voluntary Manslaughter
5) Guilty of Involuntary Manslaughter
6) Not guilty.
7) Not responsible by reason of insanity
8) Guilty of Murder but mentally ill
9) Guilty of Voluntary Manslaughter but mentally ill
10) Guilty of Involuntary Manslaughter but mentally ill.

The Guilty of Murder Rape verdict was returned on September 12, 1981. The jury was allowed to go home

and was instructed to return on September 15 for the penalty phase of the trial. Before the jury returned on the 15th, defense counsel made a motion to reject the verdict because two verdict forms were not submitted to the jury. After some discussion this motion was denied and the penalty phase of the trial began. On appeal, defendant Schiro argues that it was reversible error to omit the following forms: Guilty of Murder while committing and attempting to commit rape, but mentally ill; and Guilty of Murder while committing and attempting to commit Criminal Deviate Conduct but mentally ill.

In *Himes v. State*, (1980) Ind., 403 N.E.2d 1377, 1382, this Court wrote:

> "We have previously held that when the jury was permitted to retire without sufficient forms of verdict, the number of forms submitted cannot be considered as reversible error where the record does not show that the accused tendered or requested any other forms. *Bowman v. State*, (1934) 207 Ind. 358, 192 N.E. 755; *Kirkland v. State*, (1956) 235 Ind. 450, 134 N.E.2d 223."

An examination of the hearing on the September 15th motion reveals that the trial court originally raised the question of insufficient verdict forms. At that time defense counsel did not request that any additional verdict forms be submitted but apparently changed his mind a few days later. Thus, we find no reversible error because defendant failed to request any other verdict forms when the situation was first brought to his attention. *Himes, supra.*

The trial court also mentioned that Defendant's Instruction 3 informed the jury that the verdict of guilty but mentally ill was submitted to them on all counts of the information. Thus, the jury was informed that the mentally ill verdict applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of



Murder. Defendant has failed to show any prejudice on this issue. *Johnson v. State*, (1982) Ind., 432 N.E.2d 403, 405. There is no reversible error on this issue.

## VII

Finally, defense counsel moved to strike a portion of the presentence report which listed certain factors as "aggravating." Defendant Schiro feels that this conclusory language invades the province of the trial court in determining the existence of aggravating and mitigating circumstances under Ind.Code § 35-50-2-9. The presentence report recommended that Schiro receive a severe penalty. Defendant moved to have the recommendation section removed from the report, but was overruled by the trial court, althought it did delete one sentence which characterized various factors as aggravating circumstances.

Ind.Code §§ 35-4.1-4-9, -10 (35-50-1A-9, -10) (Burns Repl.1979) provide for the making of a pre-sentence report in order to assist the judge in sentencing. Some factors the probation officer may take into account include "the convicted person's history of delinquency or criminality, social history, employment history, family situation, economic status, education and personal habits." Ind.Code § 35-4.1-4-10 (35-50-1A-10). Furthermore, this Court wrote in *Lottie v. State*, (1980) Ind., 406 N.E.2d 632, 640:

> "[T]he Court of Appeals held [in *Halligan v. State*, (1978) 176 Ind.App. 472, 375 N.E.2d 1151] that the pre-sentence investigation and report may include any matter which the probation officer deems relevant to the question of sentence. These matters obviously could be in favor of or against the defendant and are presented in the report as a finding or an opinion of the probation officer. The defendant is, of course, given the opportunity to rebut any and all of these matters. . . . The United States Supreme

> Court has stated that it is essential for a sentencing judge to be as well informed as possible concerning the defendant's life and characteristics in order to select an appropriate sentence. The Court further stated that '. . . modern concepts individualizing punishment have made it all the more necessary to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.' *Williams v. New York,* (1949) 337 U.S. 241, 247, 69 S.Ct. 1079, 1083, 93 L.Ed 1337,1343."

Schiro was given the opportunity to refute the allegations made in the report. It appears that Schiro had a "personality conflict" with the probation officer because she was a woman and he also contested portions of the report wherein he admitted making false statements in order to receive leniency for earlier crimes. The sentencing judge listened patiently to everything Schiro had to say and then gave his decision. Trial court judges are presumed to know and understand the laws of this state. The mere fact that the probation officer labeled certain factors as "aggravating" does not imply that the judge would automatically assume that this is so. As the record shows, the trial judge did scratch the last reference to "aggravating factors." Defendant Schiro has not shown that any portion of the pre-sentence report was illegal or that it should not have been presented to the trial judge.

We affirm the trial court in all matters and in the imposition of the death penalty. This cause is remanded to the trial court for the purpose of setting a date for the death sentence to be carried out.

GIVAN, C.J., and HUNTER, J., concur.

DeBRULER, J., concurring and dissenting with separate opinion.



PRENTICE, J., concurring and dissenting with separate opinion.

DeBRULER, Justice, concurring and dissenting.

Following the jury sentencing hearing, the jury, after deliberating for one hour, returned a unanimous recommendation that the death penalty not be imposed. Two weeks later at the judge sentencing hearing, the judge overrode that recommendation and sentenced appellant to die. The conviction should be affirmed, but several independent legal grounds exist which require the penalty of death to be vacated.

I.

Upon considerations going to the meaning and spirit of the Double Jeopardy Clause of the Fifth Amendment and the like provision of the Indiana Constitution, Art, § 14, a sentencing judge cannot be permitted to override a jury recommendation of no death penalty arrived at pursuant to the death sentence statute. Ind.Code § 35-50-2-9. A jury verdict of not guilty on the issue of guilt or innocence is absolutely beyond the authority of judges to override. *Fong Foo v. United States,* (1962) 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629. This fixed and unyielding characteristic of the jury verdict of acquittal exists by reason of the pronouncements of courts that the Double Jeopardy Clauses require it to exist. No state statute or act of Congress can change this. Only a constitutional amendment could do so. Justice Blackmun for the United States Supreme Court in *Bullington v. Missouri,* (1981) 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270, in referring to the immutability of the verdict of acquittal states:

> "The values that underlie this principle, stated for the Court by Justice Black, are equally applicable when a jury has rejected the State's claim that the defendant deserves to die:

> 'The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent, he may be found guilty.' *Green v. United States,* 355 U.S. [184], at 187-188, 78 S.Ct. [221], at 223-224 [2 L.Ed.2d 199].

See also *United States v. DiFrancesco,* 449 U.S. [117], at 136, 101 S.Ct. [426], at 437 [66 L.Ed.2d 328]. The 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial. The 'unacceptably high risk that the [prosecution], with its superior resources, would wear down a defendant.' *id.,* at 130, 101 S.Ct., at 433, thereby leading to an erroneously imposed death sentence, would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment. Missouri's use of the reasonable doubt standard indicates that in a capital sentencing proceeding, it is the State, not the defendant, that should bear 'almost the entire risk of error.' *Addington v. Texas,* 441 U.S. [418], at 424, 99 S.Ct. [1804], at 1808 [60 L.Ed.2d 323]." 451 U.S. at 445-446, 101 S.Ct. at 1861-1962.

That court went on to announce that the sentencing proceeding before the Missouri jury was like the trial on the question of guilt or innocence, and that as a conseqence thereof, a resultant jury rejection of the death



penalty, by reason of the Double Jeopardy Clause has the same immutable characteristic as the jury verdict of not guilty. Appellant contends that the jury recommendation against imposition of the death penalty under the Indiana death sentence statute should be treated in like manner, and that therefore the sentencing judge in making a final determination of the sentence can have no power to override it and impose death. I agree. The recommendation of the jury against death should have the force of an acquittal of the death sentence, and a recommendation that the death penalty be imposed should have the same force as a verdict of guilty.

Pursuant to the statute the jury reconvenes in court for the sentencing hearing. It is presided over by the judge. The defendant is present with his counsel and the state by its trial prosecutor. Evidence is presented in an adversarial setting. The jury receives the instruction from the court regarding the issues presented which include the question of whether an aggravating circumstance exists and whether it is of such a character as not to be outweighed by mitigating circumstances. The burden is upon the state to prove the aggravating circumstance beyond a reasonable doubt. The lawyers make final arguments to the jury. The jury retires to deliberate and returns into open court with its verdict in the form of a recommendation. This is a full scale jury trial in every sense of those terms. The defendant must surely feel that he is in "direct peril" of receiving the death penalty as he stands to receive the recommendation of the jury. *Cf., Green v. United States,* (1957) 355 U.S. 184, 78 S.Ct. 221, 2 L.Ed.2d 199.

The majority opinion concludes that the *Bullington* rationale does not apply to the Indiana situation because (1) the recommendation of the jury is not final and binding upon the sentencing judge, as was the case in Missouri, and (2) the recommendation does not necessarily reflect the jury's determination that the State failed

in its burden to prove an aggravating circumstance. I cannot agree that these two distinctions rob the Indiana death sentencing hearing before a jury of its trial character and force. It must be evident that the jury recommendation against imposition of death will have a great and profound persuasive force in determining what choice the judge will make at final determination time. The jury recommendation must be unanimous. *Judy v. State*, (1981), Ind., 416 N.E.2d 95. It is the personal judgment of twelve adult individuals of good will selected from a list comprised of a fair cross section of the community. The judge is also a member of that same community, sharing in its life and experience. The probability is very high that the judge, upon consideration of the recommendation will be brought to the brink of agreement with it in the very nature of things. The jury recommendation against death is so much like a binding decision, that constitutional protection against a second hearing before the judge on the propriety of death should be afforded. *Cf., Breed v. Jones*, (1975) 421 U.S. 519, 95 S.Ct. 1779, 44 L.Ed.2d 346.

I also cannot agree with the analysis made by the majority of the underlying bases of the jury recommendation of no death in distinguishing this case from *Bullington*. According to the Indiana statute:

> "(e) . . . . The jury may recommend the death penalty only if it finds:
>
> (1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and
>
> (2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances." Ind.Code § 35-50-2-9.

According to this statute, a jury recommendation of no death would have one of two necessary characteristics. Logically, it would either be based upon the jury's determination that the State had failed to establish historical



facts constituting an aggravating circumstance, or it would be based upon the jury's determination that the evidence presented had established historical facts constituting some mitigating circumstance. In either event, the judge's later procedure to decide whether the death penalty should be imposed, using "the same standards that the jury was required to consider" would result in a retrial upon the same questions of fact and any decision of the judge to override a jury recommendation of no death including as in the present case his express finding of no mitigating circumstances, would necessarily resolve one of those same questions of fact in a manner contrary to the manner in which the jury resolved it. Under our legal tradition, the determination of fact by a jury in favor of the defendant in a criminal case is not subject to being resolved at a later date by a judge in such a manner as to place the defendant in a worse position.

In the case of *United States v. DiFrancesco*, (1980) 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328, it is said:

> "The exaltation of form over substance is to be avoided. The Court has said that in the double jeopardy context it is the substance of the action that is controlling, and not the label given that action". 449 U.S., at 142, 101 S.Ct., at 440.

Here the statutory label is "recommendation". The substance beneath it is a factual adjudication and moral judgment of the jury, not a court master, not a court commissioner, but a jury of twelve, that the human qualities which warrant imposition of the death penalty are not present in Thomas N. Schiro. This favorable jury determination was awarded in a fair and open adversarial confrontation with the prosecutorial forces of the State. Since that award came from a jury after a full-blown trial, a judge, applying the same rational and specific standards as the jury was required to use, can-

not, consistent with the protection of the guarantee against double jeopardy, upon making contrary factual findings, take it away.

II.

The nunc pro tunc entry of the judge first notes that the verdict of the jury finding appellant Schiro guilty of murder while committing or attempting the crime of rape as charged in Count II was returned to court on September 13, 1981. The jury reconvened on September 15, 1981 and a death sentence hearing was held pursuant to Ind.Code § 35-50-2-9 resulting that day in a recommendation that the death penalty not be imposed. It further reflects a sentencing hearing was held on October 2, 1981, and continues in part pertinent to the judge's final determination that the sentence of death be imposed:

"On october 2, 1981, this Court having reviewed the evidence of the trial and having considered the written pre-sentence report, and having heard the arguments of counsel and the statement of the Defendant, gives the following reasons for the imposition of its death sentence.

These are the aggravating circumsatnces which the State has proved beyond a reasonable doubt. Under Indiana Code, Section 35-50-2-9, Subsection [1] The Aggravating circumstances alleged.

> (b) The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery,

1. The verdict of the jury on September 12, 1981, found the Defendant Thomas N. Schiro guilty



of Murder while committing and attempting statutory rape.

2. The jury rejected the plea of insanity by its verdict.

Since aggravating circumstances were proven beyond a reasonable doubt, it remains to consider whether any mitigating circumstances exist and outweigh the aggravating circumstances.

As for mitigating circumstances, the Court finds none. Under Indiana Code § 35-50-2-9, subsection (c) the mitigating circumstances that may be considered under this section are as follows . . . ."

At this point in the entry, the judge notes each mitigating circumstance and upon consideration of evidence rejects each possibility. After proceeding through that, the entry continues:

> "Since the State proved 'beyond a reasonable doubt that existence of at least (1) of the aggravating circumstances alleged', (Indiana Code § 35-50-2-9, Section 9[9] and the Court finds no mitigating circumstances to outweigh it, the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.
>
> The Defendant is to be executed, as by law provided, on the 28th day of January, 1982, before sunrise."

Indiana Code § 35-50-2-9, the death sentence statute, provides in pertinent part as follows:

> "(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b) of this section. *In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence*

*of at least one of the aggravating circumstances alleged.*

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

* * * *

(c) The mitigating circumstances that may be considered under this section are as follows:

* * * *

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing; if the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury, or the court, may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) The aggravating circumstances alleged; or

(2) Any of the mitigating circumstances listed in subsection (c) of this section.

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and

(2) That any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.



*The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.*" (Emphasis added.)

Indiana Code § 35-50-2-9(e)(2) requires the sentencing judge to make the final determination of whether the death penalty should be imposed "based upon the same standards that the jury was required to consider." The standards referred to are the two listed in the same paragraph of the statute, the first of which is:

> "(1) That the state has proved beyond a reasonable doubt that at least one of the aggravating circumstances exists; and"

The aggravating circumstance alleged in Count IIA is as follows:

> "(1) The murder of Laura Luebbehusen charged in Count II was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Rape, as more particularly described in the Information . . . ."

According to the requirements of these provisions, it was necessary for the sentencing judge to *personally* conclude as a trier of fact that the State, at the sentencing hearing before the jury, proved to a moral certainty beyond a reasonable doubt that Thomas Schiro strangled and thus killed Laura Luebbehusen while committing or attempting to commit a rape upon her and at the time his mind had formed the *mens rea* identified by Ind.Code § 35-41-2-2 as "intentional", i.e., that he had a conscious objective to strangle and kill. I can find no direct statement in the judge's records and statement of reasons quoted above for imposing the death penalty that he *personally* reached this level of certainty upon each of these elements comprising

the aggravating circumstance. Quite obviously, until the point in time is reached that the judge conducts his own sentencing hearing to finally determine the sentence, he has not been called upon to make a factual determination beyond a reasonable doubt of the existence of the aggravating circumstance. The fact that the jury may have done so on some of the same elements in arriving at its verdict of guilty and in rejecting the plea of insanity as noted by the judge, cannot supplant the judge's obligation to do so. This finding of an aggravating circumstance by the sentencing judge is at the very core and heart of the final determination that death is to be imposed. The sentencing judge has not communicated to this Supreme Court Justice that he arrived at that finding at the required level of certainty. For this reason also, I cannot vote to permit his final determination to stand.

PRENTICE, J., concurs in part with concurring and dissenting opinion.

PRENTICE, Justice, concurring and dissenting.

I concur in the result reached by the majority with respect to its affirmance of the conviction of the defendant (appellant). I dissent, however, with respect to its affirmance of the sentence of death.

I.

I concur in part II of Justice DeBruler's dissenting opinion. The findings of the sentencing judge are devoid of any statement that he, himself, found, beyond a reasonable doubt from the evidence, that the defendant intentionally killed Laura Luebbehusen while committing or attempting to commit a rape upon her. I do not question that, under our standard for testing the sufficiency of the evidence upon appellate review, the evidence would have permitted such a finding, but it was not compelled. In the statement of his findings, the trial court judge correctly observed that one of the statutorily provided aggravating circumstances authorizing the imposition of a sentence of death is that the defendant committed murder by intentionally killing the victim. He proceeded to note, in particularity, that the jury had rejected Defendant's plea of insanity, and from this, he apparently concluded either that the jury had found, beyond a reasonable doubt, that the murder had been committed intentionally or that he was warranted in finding, beyond a reasonable doubt, from the jury's rejection of the insanity plea, that the murder had been committed intentionally. Neither would be correct.



Under the evidence, Defendant could have been found guilty of the crime charged whether he killed Laura Leubbehusen *intentionally* or knowingly or merely accidentally while committing or attempting to commit a rape. He was subject to the death penalty, however, only if he killed her *intentionally*. The interposition and rejection of the defense of insanity (mental disease or defect) Ind.Code § 35-41-3-6 (Burns 1979) simply has no relevance to the issue of whether or not the killing was done intentionally; yet, it is obvious that the trial court judge regarded it as significant, if not in fact controlling.

II.

The trial court judge also misconstrued the statute, Ind. Code § 35-50-2-9 (Burns 1979), as a mandate to the judge to impose the death sentence in the event that an aggravating circumstance was found to exist, beyond a reasonable doubt, and that mitigating circumstances, if any, were outweighed by it. Clearly, the statute merely authorizes the imposition of the death sentence, under such circumstances.

Given the existence of one or more of the enumerated aggravating circumstances and the absence of any of the first six (6) mitigating circumstances enumerated under

subsection (c) of the statute, the statute mandates neither a recommendation of death by the jury nor the imposition of the death penalty by the judge. Subsection (e) provides that the standards employed by the jury and those employed by the judge be the same, and the seventh (7th) enumerated mitigating circumstance is entirely subjective, i.e., "(7) Any other circumstances appropriate for consideration." It permits unbridled discretion to spare defendant from the supreme penalty.

The majority has said, "The language of the trial court may appear awkward but nowhere has the trial court * * * attempted to apply anything resembling a mandatory death penalty." I emphatically disagree with this statement. The statement of the trial judge, for the most part, was a recitation of the death sentence statute and certain evidence supportive of the sentence. There is nothing contained in the statement of the trial judge, however, that acknowledges that it is he who has determined that the defendant should die. There is nothing contained in the statement to indicate that he understood that it was his burden, under the law, to determine whether the defendant should live or die. Rather, the entire tenor of the findings that closed with the statements, "* * * the death sentence is required by the Statutes of the State of Indiana. This Court has no choice but to follow the law.", reflects that the judge regarded himself as a mere conduit who had the unpleasant ministerial duty to announce a sentence fixed by statute.

The trial judge's comments amply demonstrate his misunderstanding of the standard he was required to apply in reaching the sentencing decision. Ind.Code § 35-50-2-9 affirmatively mandates the judge to employ the same standards that the jury was required to consider. That standard is stated as follows:

> "The jury *may* recommend the death penalty only if it finds: * * *."



In *Hoskins v. State*, (1982) Ind., 441 N.E.2d 419, 430 (Prentice, J., joined by Hunter, J., concurring) I noted that this standard does not require the imposition of the death penalty under any circumstances whatsoever and that, "It is not altogether illogical to conclude, therefore, that although a juror finds facts warranting the death penalty and no mitigating circumstances whatsoever, he *may*, nevertheless, recommend against imposing it without violating his oath." Similarly, the trial judge may refrain from imposing a sentence of death even though its imposition could not be held to be unreasonable under the circumstances. Moreover, it appears from the context of the judge's comments that, had he believed he had a choice, which he in fact did have under the statute, he would not have sentenced Defendant to death. The record reveals that the death sentence was imposed upon an erroneous standard. Consequently, the matter should be remanded for a new sentencing hearing. *State v. Watson*, (1982) La., 423 So.2d 1130, 1134-36.

In addition to being convinced that the sentence was imposed upon an erroneous standard, I am also convinced that the provisions of Ind.Code § 35-50-2-9, read in conjunction with Federal Due Process requirements concerning capital punishment, require the judge to give considerable weight to the jury's recommendation of mercy and this Court to review a death sentence, imposed contrary to the recommendation of the jury, upon a standard higher than a mere search for *manifest unreasonableness* as currently required under Ind.R.App.Rev.Sen. 2.

The nunc pro tunc order of February 23, 1983 does not state how the jury's recommendation was considered nor how much weight it was given by the judge.

The United States Supreme Court considers the jury "a significant and reliable objective index of contemporary values" with respect to the imposition of the death penalty. *Gregg v. Georgia*, (1976) 428 U.S. 153, 181, 96 S.Ct. 2909, 2929, 49 L.Ed.2d 859, 879 (plurality opin-

ion of Stewart, J.); *Accord Brewer v. State,* (1981) Ind., 417 N.E.2d 889, 909. Our Legislature echoed these sentiments when it mandated the trial court to consider the jury's recommendation, Ind.Code § 35-50-2-9(e), and by allowing the jury to consider "any other circumstances appropriate for consideration." Ind.Code § 35-50-2-9(c)(7), as a mitigating circumstance. In light of this acknowledged importance of the role of the jury, before a judge may impose a death sentence over a jury recommendation of no death sentence, that judge must articulate written findings, derived from clear and convincing evidence in the record, so that no reasonable person could differ with the determination. This standard, which has been utilized by the Supreme Court of Florida, *e.g. Cannady v. State,* (1983) Fla., 427 So. 723, 732 (per curiam); *Tedder v. State,* (1975) Fla. 322 So.2d 908, 910 (per curiam), preserves the defendant's interests in having obtained a favorable jury recommendation after an adversary proceeding. *See Bullington v. Missouri,* (1981) 451 U.S. 430, 445-46, 101 S.Ct. 1852, 1861, 68 L.Ed.2d 270, 283. Any standard of less stringency detracts from the jury's contribution to the sentencing decision as recognized by the specific legislative directive that the judge consider the jury's recommendation. Given this command, and the statement of public policy that the death penalty is only discretionary even if all the requisite standards of proof are satisfied, in the case where the jury recommends mercy, the Legislatuure could not have intended that the judge merely disagree in order to override that recommendation. But for mere form, the trial judge may as well have discharged the jury upon receipt of the verdict upon the issue of guilt. It is clear that he either thought that the death sentence was required by law or that it was unalterably set in his mind. Hypothetically we could not accept a statement that proclaimed: "I find that the State has proven the existence of an aggravating circumstance authorizing a sentence of death, and I find no mitigating



circumstances. I further find that the defendant by erratic conduct during the trial, may have persuaded the jury to recommend mercy—or for reasons unknown, the jury may not be capable of rendering a rational recommendation upon the sentence determination. In any event, I have determined that a sentence of death is authorized by law, warranted by circumstances and preferred by me. A recommendation of a life sentence by the jury would not alter my decision. I, therefore, dispense with the jury hearing upon the sentencing phase of this matter, and I now order a sentence of death." From a "due process" standpoint, the hypothetical is no more repugnant than the procedure and findings actually employed in this case.

I am also concerned that the trial judge has displayed an apparent misunderstanding of the term "mitigating circumstances," as used in this statute. I am drawn to this conclusion by his statements: "As for mitigating circumstances, the Court finds none.", and, "* * * and the Court finds no mitigating circumstances to outweigh it (the aggravating circumstance)." Whether or not there were mitigating circumstances of such weight as to create a conflict in the mind of a reasonable man upon a determination of the appropriate sentence is not a matter upon which I intend to imply an opinion. However, the record is replete with unrefuted evidence of circumstances which a reasonable man could not but weigh in the balance in making a decision of such gravity. In the main, I refer to the sordid evidence of the defendant's character, a paragon of revulsion which society simply cannot tolerate unfettered. This same evidence, however, also portrays a sick, rejected and tormented creature who, although legally accountable for his loathsome and despicable conduct is, himself, a victim of forces essentially beyond his control. Whether or not he should be permitted to live by reason of these circumstances, despite his vile crime, is a matter upon which reasonable minds may differ; but human decency, the statute (any other circum-

stances appropriate for consideration), and due process considerations require that they be weighed in the balance. The denial of the existence of any mitigating circumstances is indicative of the trial judge's misconception of his sentencing responsibility that is likely to have resulted in grievous error.

Additionally, the judge's unbridled discretion to reweigh the evidence under the same standards considered by the jury, which action I am not convinced occurred here, potentially injects the same type of arbitrariness into the system which the Supreme Court has condemned. In cases where the judge and jury disagree, Florida's heightened standard of proof has been implicitly approved as an integral and significant factor in sustaining the constitutionality of the sentencing scheme. *Barclay v. Florida,* (1983) —— U.S. ——, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (plurality opinion); *Dobbert v. Florida,* (1977) 432, U.S. 282, 295-96, 97 S.Ct. 2290-2299, 53 L.Ed.2d 344, 357-58; *Proffitt v. Florida,* (1976) 428 U.S. 242, 249, 96 S.Ct. 2960, 2965, 49 L.Ed.2d 913, 921. In light of Ind.Code § 35-50-2-9 and the above cited authorities, I am compelled to conclude that this Court's failure to impose a heightened standard of proof upon a judge who seeks to override a jury recommendation of mercy runs afoul of Federal constitutional proscriptions concerning the due process required prior to imposition of the death penalty.

III.

Upon Issue No. V in the majority opinion, I believe that the appropriate standard for authentication has not been provided.

> "Anyone who is familiar with a person's writing from experience, having seen him write, or having carried on correspondence with him or from the opportunities of having frequently handled and observed the person's handwriting, is competent as a non-expert



> to give an opinion as to the genuiness of his signature or handwriting." *Spenser v. State,* (1958) 237 Ind. 622, 626, 147 N.E.2d 581, 583.

Dr. Abendroth testified that he had received three or four letters from Schiro, and he recalled some of their contents which he related to the court. He was also not equivocal about his ability to identify Defendant's handwriting nor to identify the exhibit at issue.

The majority appears to imply that, because Dr. Abendroth did not swear to knowledge of the origins of the first letters, he was not qualified to identify Defendant's handwriting. I do not understand the connection and note that in *Thomas v. State,* (1885) 103 Ind. 419, 427-29, 2 N.E. 808, 813-15, no such connection was required. Therein, though the witness produced ten letters, assertedly written by Defendant, before identifying the handwriting on the two letters, exhibits at issue, there was no testimony of how the witness knew that the accused had penned the first ten. Additionally, in this case, there is no showing that Mary Lee, whom the majority asserts could have provided the necessary authentication, did anything more than deliver the letter nor that she had any familiarity with Defendant's handwriting. Consequently, under the majority's ruling, in most cases, only the author of the letter would be able to authenticate it no matter how many times the witness, through whom a party sought to introduce the letter, had received letters from the author of the letter at issue. The law does not impose this onerous burden as the foundation for admitting a letter. *Thomas v. State, supra.*

However, the trial court has broad discretion in admitting or rejecting writings authenticated only by testimony of a witness who professes to recognize the author's handwriting. Thus, although I do not agree with the majority's conclusion that the letter was inadmissible, neither do I believe that the court committed error by rejecting it, as

it was not required to accept Dr. Abendroth's testimony as a sufficiently reliable authentication.

I vote to affirm the trial court's judgment with respect to the conviction of Defendant but to vacate the death sentence and remand the case for a new sentencing hearing.



SUPREME COURT OF INDIANA

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No. 1084S423

THOMAS N. SCHIRO,
*Appellant,*

v.

STATE OF INDIANA,
*Appellee.*

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June 28, 1985

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Rehearing Denied Sept. 4, 1985

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GIVAN, Chief Justice.

Appellant was convicted by a jury of Murder While Committing or Attempting to Commit Rape. The trial court sentenced appellant to death. The conviction and death sentence were affirmed by this Court on direct appeal. *Schiro v. State* (1983), Ind., 451 N.E.2d 1047 (DeBruler, J., and Prentice, J., dissenting as to sentence), *cert. denied,* —— U.S. ——, 104 S.Ct. 510, 78 L.Ed.2d 699. Appellant's Petition for Post-Conviction Relief was denied. He now appeals.

The facts of this case were set out at length in the opinion on direct appeal. *Schiro, supra* at 1049-50. They will not be repeated here.

Appellant raises two issues in this appeal: whether the post-conviction court erred in finding the death penalty

was proper in light of his allegations that the trial judge was biased and improperly considered appellant's behavior during the course of the trial in his sentencing determination; and whether the post-conviction court erred in finding appellant was not denied effective assistance of counsel.

In reviewing the denial of a post-conviction petition, this Court does not weigh evidence nor judge the credibility of witnesses. *Owens v. State* (1984), Ind., 464 N.E.2d 1277. The petitioner must satisfy this Court that the evidence as a whole leads unmistakably to a decision in his favor. *Bean v. State* (1984), Ind., 467 N.E.2d 671.

Appellant's first issue is divided into four subissues. In the first three subissues, which address the trial court's consideration of his behavior during the trial, appellant alleges: 1) that the information could not be relied upon because it was not introduced into evidence; 2) that because he did not testify, reliance on observations of his behavior volated his Fifth Amendment rights; and 3) that he was denied his right to effective assistance of counsel because defense counsel was not afforded an opportunity to comment on facts influencing the sentencing decision. The fourth subissue concerns a comment made by the trial judge which appellant argues demonstrates the judge was biased and therefore unable to objectively render the sentencing determination.

Upon review of appellant's direct appeal, this Court found the trial court's original findings pertaining to the sentencing did not set out clearly and properly the court's reasons for imposing the death penalty. *Schiro, supra* at 1056. We ordered the court to make written findings setting out the aggravating circumstance proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified in Ind.Code § 35-50-2-9. *Id.* In its *nunc pro tunc* entry the court found that the aggravating circumstances set out in Ind.Code § 35-50-2-9(b)(1) was proved beyond a reasonable doubt.



The court then stated that it found no mitigating circumstances, and addressed each of the possible mitigating circumstances delineated in Ind.Code § 35-50-2-9. In reference to the statutory mitigating circumstances concerning a defendant's mental or emotional condition, subsection (c)(2), and impairment of a defendant's capacity to appreciate the criminality of his conduct, subsection (c)(6), the court made the following finding:

> "This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

Appellant contends this finding constitutes the court's primary basis for sentencing him to death after the jury recommended the death penalty not be imposed. He argues that "obviously" the court based its death penalty judgment on its observations, representing an "absolute denial of due process."

We cannot agree with appellant's conclusory assertion that the court based its judgment on observations of his behavior. The court, as prescribed by the death penalty statute, found the existence of an aggravating circumstance proved beyond a reasonable doubt. *Schiro, supra* at 1058. It addressed each of the possible mitigating circumstances delineated in the statute. Regarding appellant's mental state, the court made additional findings which cited testimony by psychiatric experts and evidence of appellant's attempt to conceal his crime. *Id.* at 1059. While the court's observations were certainly germane to its consideration of the jury's recommendation,

it cannot be said its finding that appellant may have misled the jury constituted the basis for imposition of the death penalty.

Neither can we agree with appellant's contention that consideration of his behavior was impermissible because it was information not admitted into evidence. It is axiomatic that a trial court, within its discretion, can consider a defendant's behavior in the courtroom, regardless of whether the jury is present. The court can properly consider such "non-evidentiary" information as the presentence investigation report and its perception of a defendant's remorse or lack thereof. We find no authority to support the conclusion appellant would have us draw, that a judge in a capital case is precluded from considering a defendant's behavior during the course of the trial if evidence of such behavior is not admitted into evidence.

Appellant nevertheless argues that under *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed. 2d 393, the death penalty is invalid. In that case a Florida jury recommended a life sentence. The trial judge, as in the instant case, overrode the jury's recommendation and sentenced the defendant to death. In imposing the death penalty the judge stated that his decision was based in part on a presentence report which contained a confidential portion not available to the defense. *Id.* at 353, 97 S.Ct. at 1202, 51 L.Ed.2d at 398-99.

The United States Supreme Court vacated the death sentence. The Court concluded the petitioner was denied due process because the death sentence was imposed, at least in part, on the basis of information which the petitioner had no opportunity to deny or explain. *Id.* at 362, 97 S.Ct. at 1207, 51 L.Ed.2d at 404. The Court found that because the confidential portion of the report was not part of the record on appeal, the Florida Supreme Court was unable to consider "the total record" in its review. *Id.* at 361, 97 S.Ct. at 1206, 51 L.Ed.2d at 404.

The instant case is distinguishable. At the sentencing hearing the judge expressly stated his observations of



appellant's behavior and its relevance to the sentencing determination. Appellant thus had an oportunity to challenge the observations, and the judge's conclusion based thereon, either contemporaneously or upon filing his motion to correct error. Further, this Court explicitly considered the controverted finding on review of appellant's direct appeal. *Schiro, supra* at 1057, 1059.

We also note that testimony was introduced at trial by both sides in reference to appellant's prior rocking behavior. Appellant introduced testimony that he rocked in the presence of witnesses. Despite appellant's contention of lack of notice of the court's conclusion based on such behavior, defense counsel, who was certainly aware of the continual rocking motions referred to by the court, could have presented additional evidence at the sentencing hearing pertaining to the statutory mitigating circumstances. *See* Ind.Code § 35-50-2-9(d). The due process violation found in *Gardner, supra* is not present here.

Appellant contends that because under the Fifth Amendment of the United States Constitution and Art. 1, § 14 of the Indiana Constitution the general trial demeanor and manner of a defendant who does not take the stand cannot be considered against him and no inference can be drawn from his failure to testify, the trial court's consideration of his behavior violates his right against self-incrimination.

This argument is without merit. The sole case cited by appellant, *People v. Ramirez* (1983), 98 Ill.2d 439, 75 Ill.Dec. 241, 457 N.E.2d 31, is inapposite to the circumstances of the instant case. In *Ramirez* the State's attorney commented to the sentencing jury that the defendant had "sat silent" and offered no explanation for the crime. The Supreme Court of Illinois' decision to vacate the death sentence was based on the prosecutor's comment and the trial judge's refusal to properly instruct the jury not to consider the defendant's decision not to tesufy at the sentencing hearing. *Id.* at 472-73, 457 N.E.2d at 47.

Although the impermissible comment in *Ramirez* was couched in terms of the defendant's "conduct", the crux of the constitutional violation was the impropriety of commenting on the defendant's decision not to testify. Here, the trial judge's observations were directed to two of the possible mitigating factors and to the jury's recommendation, not to appellant's exercising of his constitutional rights. The record does not reveal any comment by the prosecution or by the court made in reference to appellant's decision not to testify at the sentencing hearing.

In an argument related to his contention that the trial court erred in considering non-evidentiary information, appellant asserts he was denied his Sixth Amendment right to effective representation upon the sentence being based on information which he had no opportunity to deny or explain.

This argument is also without merit. At the sentencing hearing the trial judge specifically stated his observations and their relevance to the sentencing determination. Counsel thus had the opportunity to contemporaneously object to or rebut the judge's observations. As the finding was stated explicitly and openly, we cannot conclude that the court's reference to its observations of appellant's demeanor precluded defense counsel from commenting on facts influencing the sentencing decision. *See Gardner, supra*, 430 U.S. at 360, 97 S.Ct. at 1206, 51 L.Ed.2d at 403.

In his fourth subissue appellant alleges the trial judge was biased. This allegation is premised on a comment made by the judge to a newspaper reporter which appellant argues supports the conclusion the judge had predetermined that the death penalty would be imposed.

The newspaper reporter, Jocelyn Winnecke of the *Evansville Sunday Courier and Press*, testified at the post-conviction hearing that the judge, The Honorable Samuel R. Rosen, remarked to her after the guilty verdict was returned that "we're going to fry the boy." Judge Rosen



testified that before entering the courtroom to receive the guilty verdict he said "soon we'll know whether he'll live or die." Judge Rosen also testified that he would never use the word "fry" in that context and that he did not make up his mind until the date of sentencing whether the death penalty would be imposed. Vanderburgh County Deputy Prosecutor Jerry Atkinson, who prosecuted the case, was privy to the conversation between Winnecke and Judge Rosen. His recollection at the hearing was that Judge Rosen stated "I think the boy is going to die."

Appellant argues that the judge's statement, coupled with the judge's reliance on his personal observations, conclusively reflects bias and a predetermination of the death sentence. As stated *infra*, the observations were properly relied upon by the judge and in no way represent a loss of objectivity. The comment made by Judge Rosen, in the emotionally charged atmosphere preceding the return of the verdict, is insufficient evidence from which to conclude the judge was so biased as to make the sentencing determination arbitrary or capricious. The post-conviction court did not err in finding it was not improper for the trial judge to consider appellant's behavior and that the death sentence did not result from a loss of objectivity on the part of the judge.

Appellant also alleges he was denied his Sixth Amendment right to effective assistance of counsel because his trial counsel failed to assure that the jury received all the necessary verdict forms.

In addressing the issue of competency of counsel, this Court indulges a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. *Bailey v. State* (1985), Ind., 472 N.E.2d 1260; *Elliott v. State* (1984), Ind., 465 N.E.2d 707. We apply a two-step test comprised of a "performance component" and a "prejudice component." Under the first step, a defendant must show counsel's alleged acts or

omissions fell outside the wide range of reasonable professional assistance. If the defendant satisfies the first step of the test, he must then establish that counsel's errors had an adverse effect upon the judgment. *Richardson v. State* (1985), Ind., 476 N.E.2d 497; *Lawrence v.* State (1984), Ind., 464 N.E.2d 1291.

Trial counsel did not submit verdict forms for the offenses of guilty of murder while committing and attempting to commit rape but mentally ill and guilty of murder while committing and attempting to commit criminal deviate conduct but mentally ill. *Schiro, supra* at 1062. Appellant contends that because the jury returned a felony murder guilty verdict on a count for which they were not supplied with a guilty but mentally ill verdict form confidence in the outcome of his trial was undermined.

The issue was raised in appellant's direct appeal in the context of trial court error in failing to supply the jury with all the necessary verdict forms. *Id.* We determined that appellant's Instruction No. 2, which informed the jury that the possible verdict of guilty but mentally ill was submitted to them on all counts of the information, sufficiently informed the jury that the mentally ill verdict "applied to Guilty of Murder/Rape and Guilty of Murder/Deviate Conduct, as well as Guilty of Murder." *Id.* at 1063. As appellant failed to show any prejudice, there was no reversible error on that issue. *Id.*

In applying the aforementioned two-step test, it is not necessary to address both components if the defendant makes an insufficient showing as to one. *Richardson, supra* at 501 (citation omitted). Because the instruction regarding the encompassing applicability of the guilty but mentally ill verdicts cured the potentially prejudicial impact of the omission of the verdict forms, appellant is unable to establish that counsel's omission had an adverse effect upon the judgment. The post-conviction court did not err in finding that appellant was not denied effective assistance of counsel.



The trial court is in all things affirmed.

PRENTICE and PIVARNIK, JJ., concur.

DeBRULER, J., dissents with separate opinion.

HUNTER, J., not participating.

DeBRULER, Justice, dissenting.

Petitioner-appellant was convicted of murder and sentenced to death. When the trial judge imposed the death sentence on October 2, 1981, he stated that he was relying in part on his personal observations of appellant's conduct in the Court's outer chambers, during the trial on the question of guilt or innocence, when the jury was not present. The trial judge had not previously disclosed to counsel for the parties that he had made those observations and that he would rely upon them in making the life or death decision. Thus, the decision itself was arrived at before counsel knew of this unique basis and had all opportunity to respond to it. This procedure does not satisfy the constitutional requirement of the due process of law.

In the aforementioned statement the judge said:

> "This Court personally observed the Defendant, while the jury was present, making continued rocking motions, which did not stop throughout the trial except when the jury left the Courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation."

This is the justification of the judge's rejection of the jury's recommendation of life. By this revelation, the judge dicloses that he deemed himself by reason of his

observations, to be in a better position than the jury to make the life-death decision. I believe this was error.

In *Gardner v. Florida* (1977), 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 the sentencing judge indicated that he selected death in part because of information contained in a presentence report, which information had not been disclosed to the defendant or his counsel and to which the defendant had no opportunity to respond. The U.S. Supreme Court set the sentence aside. Here, the opportunity to respond to Judge Rosen's statement did not arise until after he had made and formally announced his decision to override the jury recommendation of life and impose death.

The standards of due process are flexible and dictated by the circumstances and competing interests involved. A hearing must be "appropriate to the nature of the case." *Mullane v. Central Hanover Tr. Co.*, (1950), 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865. It is fundamental that the right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner." *Armstrong v. Manzo* (1965), 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62. The interests of the defendant and the state in an accurate ascertainment of facts upon which a sentence of death may be given, are at the highest level. We are bound to adopt and adhere to procedures which insure against the arbitrary deprivation of life.

In these circumstances, the opportunity to respond to the factual information supplied by the judge's private observations, came after that factual information was used and the life or death decision was reached. This opportunity was not meaningful in time. The opportunity to respond was restricted to a request to reconsider a decision which had already been reached and publicly announced. Much judicial time and energy had already been invested in arriving at that decision. One need only compare the process of reaching a decision with the process



of retreating from a decision, to appreciate the reality of the restriction resulting from the procedure employed here. In sum, to permit the personal observations of the judge, this new matter, to be swept in at the last moment, without prior notice, and to be used as a critical part of the basis for the sentencing court's decision, is contrary to my sense of fairness.

IN THE CIRCUIT COURT
FOR THE COUNTY OF BROWN
STATE OF INDIANA

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Cause No. 81-CR-243

THOMAS N. SCHIRO

v.

STATE OF INDIANA

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**ORDER DENYING PETITION FOR POST-CONVICTION RELIEF**

[Filed January 15, 1988]

This Court held an evidentiary hearing on October 30, 1987, on issues raised by a Second Petition for Post-Conviction Relief filed by Messrs. Alex Voils and David Hennessy on behalf of the Petitioner Thomas N. Schiro. The Petitioner appeared in person and by his attorney, Alex Voils, and the State of Indiana appeared by Robert J. Pigman, Prosecuting Attorney of Vanderburgh County. Evidence was presented on said petition and arguments were presented to the Court. At the conclusion of the hearing, the Court took the matters under advisement to review testimony and exhibits presented at the hearing. The Court has also reviewed the post-hearing briefs submitted by Petitioner and Respondent and the reply brief of the Petitioner.

*History of Proceedings*

On September 12, 1981, the Defendant was found guilty of the offense of murder while committing and attempting to commit the crime of rape under Count II of the charging information, and the trial Court entered judgment of conviction on the verdict of the jury. On



September 15, 1981, a hearing was held pursuant to the provisions of I.C. 35-50-2-9, at which the jury unanimously recommended that the death penalty not be imposed. The trial Court scheduled the cause for sentencing on October 2, 1981. At the sentencing hearing held on October 4, 1981, the trial Court overruled the recommendation of the jury and ordered that a sentence of death be imposed.

On appeal of the cause, the Indiana Supreme Court held that the original findings of the trial Court did not set out clearly and properly the trial Court's reasons for imposing the death penalty. The Supreme Court ordered the trial Court to make written findings in the case, setting out by *nunc pro tunc* entry the aggravating circumstances which were proved beyond a reasonable doubt and the mitigating circumstances, if any, as specified by I.C. 35-50-2-9. The Petitioner was given an opportunity to contest the *nunc pro tunc* entry of the trial Court, and the State was given an opportunity to oppose the Petitioner's brief.

On February 22, 1983, the trial Court entered its pronouncement of sentence, incorporating findings as directed by the Indiana Supreme Court, *nunc pro tunc*, as of October 2, 1981. The trial Court imposed a sentence of death and ordered that the Petitioner be executed.

On appeal, the Supreme Court of Indiana affirmed the decision of the trial Court and remanded the case to the trial Court for the purpose of setting a date for the death sentence to be carried out. *Schiro v. State*, 451 N.E.2d 1047 (Ind.1983). The Supreme Court held, in part, that the Indiana death penalty statute is constitutional; that the trial Court did not err in imposing the death penalty; that it was not reversible error to omit certain verdict forms from consideration by the jury; that the *nunc pro tunc* findings made by the trial Judge were not improper and clearly set out the reasons the trial Court imposed the death penalty; that the Indiana death penalty statute permits a trial Judge to override a jury recommendation

that death not be imposed; and that the death penalty was not arbitrarily or capriciously applied to the Petitioner.

On November 28, 1983, the United States Supreme Court denied the Petitioner's writ of certiorari to vacate the death penalty. *Schiro v. Indiana*, 464 U.S. 1003, 104 S.Ct. 510. 78 L.Ed.2d 699 (1983).

On May 11, 1984, an Amended Petition for Post-Conviction Relief was filed by the Petitioner alleging denial of a fair trial at the sentencing stage of the proceedings because of partiality, bias and prejudice against the Petitioner on the part of the trial Judge.

On May 29, 1984, the Petitioner's Petition for Post-Conviction Relief was denied by Brown County Special Judge James M. Dixon.

The Petitioner appealed the denial of post-conviction relief to the Indiana Supreme Court. On June 28, 1985, that Court affirmed the trial Court's denial of relief. *Schiro v. State*, 479 N.E.2d 556 (Ind.1985).

On February 24, 1986, the United States Supreme Court denied the Petitioner's writ of certiorari to vacate the death sentence. *Schiro v. Indiana*, —— U.S. ——, 106 S.Ct. 1247 (1986).

Thereafter, the Petitioner instituted a petition for writ of habeas corpus in the United States District Court, Northern District of Indiana, South Bend Division. Judge Allen Sharp remanded to state court allowing the Petitioner to exhaust all available state remedies as required for federal habeas corpus proceedings. State remedies must be exhausted before federal habeas corpus can be sought. 28 U.S.C. Section 2254(b), *Ex Parte* Hawk, 321 U.S. 114 (1944).

On March 5, 1987, the Petitioner filed his Second Post-Conviction Relief Petition. The Petitioner filed a timely Motion for Change of Venue from the trial Court and this Court appeared, qualified and assumed jurisdiction on March 25, 1987.

On March 9, 1987, the State filed a Motion to Dismiss Petition for Post-Conviction Relief. This Court held a



hearing in the Brown Circuit Court on the Motion to Dismiss on July 15, 1987. The Petitioner appeared in person and by his attorney, Alex Voils, and the State of Indiana appeared by Chris Lenn, Deputy Prosecuting Attorney of Vanderburgh County.

On July 31, 1987, this Court ruled on the State's Motion to Dismiss Petition for Post-Conviction Relief. Issues 9(j) through 9(m) in the Petitioner's Second Post-Conviction Relief Petition were dismissed on the grounds of res judicata and prior adjudication. Issues raised and determined on appeal were not available as grounds for post-conviction relief and cannot be reviewed in post-conviction relief proceedings. Rule PC 1, Section 8, *Cambridge v. State*, 468 N.E.2d 1273 (Ind.1984).

Issues 8(a-c) and 9(a-i) were not dismissed and form the basis of the Petitioner's Second Post-Conviction Relief Petition. The State raised the defense of waiver for issues not previously raised. When the State raises a defense of waiver under Rule PC 1, Section 8, and the Petitioner has claimed inadequate appellate representation, the hearing judge is required to make a preliminary determination as to the competency of appellate counsel before reaching the otherwise waived ground for relief raised in the Post-Conviction Relief Petition. *Davis v. State*, 328 N.E.2d 768, 774 (Ind.1975).

Full hearing on the Petition for Post-Conviction Relief was scheduled for September 11, 1987. Petitioner's counsel, Alex Voils, filed a Verified Motion for Continuance and the hearing was rescheduled for October 30, 1987. On that date, this Court held a hearing on the remaining issues of the Post-Conviction Relief Petition in the Brown Circuit Court.

As grounds for vacating, setting aside or correcting the conviction and sentence, the Petitioner alleges the following:

8(a). That previous post-conviction relief counsel was ineffective and inadequate for failing to raise the follow-

ing grounds for reversal of the judgment of conviction and correction of sentence.

(b). That Defendant was denied effective assistance of counsel in preparing and presenting his defense and the appeal from the conviction.

(c). That Petitioner was denied due process of law, the equal protection of the laws and fundamental fairness and his constitutional rights thereof as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

The general areas of allegations in support of the grounds set forth above are as follows:

1. That the cause was neither adequately investigated nor properly prepared for trial.
2. That the trial Court failed to sequester or adequately admonish the jury.
3. That trial counsel failed to present evidence at either the sentencing stage of the bifurcated trial or the sentencing hearing.
4. That issues, preserved at the request of Petitioner in his Motion to Correct Errors, were waived on appeal.
5. That Petitioner was tried upon defective charging information and proceeded to the death penalty stage upon verdicts indicating a "nonintentional" killing.
6. That Petitioner was denied his right to confront the witnesses and evidence against him as applied to the testimony of Linda Gail Summerford and State's Exhibit 62.
7. That Petitioner was not provided, as an indigent, competent psychiatric assistance.
8. That members of the jury were allowed to view Defendant shackled during court recesses.

The primary focus of the Petitioner's argument is based on the eight general areas of allegations and the weave of ineffective assistance of counsel to each allegation individually. The Petitioner contends he was denied effective assistance of post-conviction counsel by their failure to present the trial counsel and appellate counsel's ineffective



assistance of counsel to either the post-conviction trial Court or the applicable appellate tribunals. Petitioner asks that the Post-Conviction Relief Petition be granted and the matter set for retrial.

This Court makes specific findings of fact and conclusions of law on each allegation presented by the Petitioner as required by Indiana post-conviction relief procedures. Rule PC 1, Section 6. *Robinson v. State*, 493 N.E.2d 765, 766 (Ind.1986).

*Allegation 1, The Cause was Neither Adequately Investigated Nor Properly Prepared for Trial.*

*Findings of Fact*

The first allegation raised by the Petitioner states that the cause was-neither adequately investigated nor properly prepared for trial. First, Petitioner contends that trial counsel did not request and did not receive a private investigator to aid in preparation of the cause for trial. Petitioner claims that an investigator would have physically traced the Petitioner's actions on the date of Laura Lubbenhusen's murder. Petitioner claims that an investigator would have found evidence of the consensual nature of Ms. Lubbenhusen's action by interviewing witnesses in an unnamed Evansville area bar and liquor store. Petitioner asserts that evidence of the consensual nature of the victim's actions should have been offered as a mitigating factor when considering the death penalty in the sentencing phase of the bifurcated trial. I.C. 35-30-2-5 (c)(3).

Donald Campbell, a former Indianapolis police detective and experienced private investigator, testified that an investigation should have definitely been done in an effort to find witnesses who saw the Petitioner and victim together. In a recent investigation, Campbell was unable to find the bar, liquor store or witnesses. Petitioner could not remember and did not disclose the name of any bar

or liquor store that he visited with the victim on the night of Laura Lubbenhusen's murder.

The second area of alleged inadequate investigation and preparation concerns the trial testimony of the Petitioner's former girlfriend, Mary T. Lee. Petitioner testified that Lee told him that the State had threatened Lee to either testify incriminating the Petitioner or she would lose her children to the authorities. Petitioner claims to have reported this incident to trial counsel who failed to investigate and cross-examine Lee about the threat. The trial Court found aggravating circumstances in Lee's testimony.

Detective Campbell testified that he was unable to locate Mary T. Lee in a recent investigation. Petitioner asserts that this is newly discovered evidence.

*Conclusions of Law*

In post-conviction proceedings, the Petitioner has the burden of establishing the grounds for relief by a preponderance of the evidence. Rule P.C. 1, Section 5.

The trial judge in post-conviction proceedings is the sole judge of the weight of the evidence and the credibility of the witnesses. *Popplewell v. State*, 428 N.E.2d 15, 16 (Ind.1981). This Court gives little weight to the credibility of Petitioner's testimony. The Petitioner has no motive to tell the truth and every motive to fabricate. Psychiatrists at the original trial testfied that the Petitioner engages in manipulative and deceitful behavior. During testimony at the second post-conviction relief hearing, the petitioner, on explaining on cross-examination why he failed to bring certain documents, stated under oath that he did not know why he was transported from X Block, death row, at Michigan City Prison to Brown County on October 30, 1987. From Petitioner's well-prepared testimony and notification from his attorney, it was apparent the Petitioner must have known he was transported for his second post-conviction relief hearing and not to see



Brown County's fall foliage. Much of the Petitioner's allegations and testimony were based on a totem pole of out-of-court statements by declarants not present to testify. For those reasons, this Court questions the reliability of Petitioner's testimony.

To prevail on a claim of ineffectiveness of counsel, Petitioner must prove that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Petitioner also must prove that counsel's failure to function was so prejudicial as to deprive him of a fair trial. A fair trial is denied when the conviction or sentence resulted from a breakdown in the adversarial process that rendered the result unreliable. *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Lawrence v. State*, 464 N.E.2d 1291 (Ind.1984).

In meeting this burden, Petitioner must overcome by strong and convincing evidence a presumption that counsel had prepared and executed his client's defense effectively. *Williams v. State*, 508 N.E.2d 1204 (Ind.1987).

A determination of ineffectiveness of counsel is factually oriented. This Court will not speculate about what may have been the most advantageous strategy and isolated bad tactics or inexperience does not necessarily amount to ineffective assistance of counsel. *Mato v. State*, 478 N.E.2d 57 (Ind.1905); *McChristion v. State*, 511 N.E.2d 297 (Ind.1987).

Judicial scrutiny of counsel performance is highly deferential and should not be exercised through the distortion of hindsight. *Nadir v. State*, 505 N.E.2d 440 (Ind.1987).

The Petitioner failed to demonstrate ineffective assistance of counsel by inadequate investigation and improper preparation for trial. The Petitioner failed to meet either prong of the *Strickland v. Washington* test by a preponderance of the evidence.

Appellate and trial counsel's representation did not fall below prevailing professional norms and Petitioner

was not deprived of a fair trial by the omission of evidence of the consensual nature of the victim's action during the sentencing state of trial. The Petitioner's claims of visits to a bar or liquor store with a consenting Laura Lubbenhusen were sketchy. The physical evidence at the scene of the crime and the victim's strong aversion toward men make it understandable why trial counsel chose not to use consent as a mitigating factor and why appellate counsel did not pursue this issue.

Trial counsel's failure to investigate the allegations of coercion against Mary T. Lee and appellate counsel's decision not to pursue this issue did not constitute ineffective assistance of counsel. The alleged coercion rests entirely on the questioned credibility of the Petitioner. Much of Lee's testimony was beneficial to the Petitioner. It is plain why counsel did not follow up the unsubstantiated accusation of coercion made against the Vanderburgh County Prosecutor's Office.

*Allegation 2, the Trial Court Failed to Sequester or Adequately Admonish the Jury.*

*Findings of Fact*

Petitioner testified that he indicated to counsel that he wanted a sequestered jury. Petitioner further testified that his counsel told him there was no need to have a sequestered jury. The record does not indicate that Petitioner made such a request and no evidence exists to dispute Petitioner's claim that he requested a sequestered jury.

Georgia Kay Brown, an Indianapolis private investigator, gathered newspaper articles concerning the Petitioner's trial available in Brown County. The media accounts of the trial from the *Columbus Republic* and *Bloomington Herald-Telephone* were admitted into evidence. Brown testified she could not locate five of the 12 jurors. None of the jurors were present at the second post-conviction relief hearing. Petitioner further contends



that the jury was not properly or adequately admonished by the trial Judge.

*Conclusions of Law*

If requested in a timely fashion, the Defendant has an unequivocal right in a capital case to have the jury sequestered. *Lowery v. State*, 434 N.E.2d 868 (Ind. 1982).

The decision not to move for jury sequestration in a capital case does not by itself constitute ineffective assistance of counsel. The decision not to request sequestration of the jury is strategic. Counsel is under no duty to request sequestration in a capital case. The petitioner must show prejudice by the failure to move for jury sequestration. *Burris v. State*, 465 N.E.2d 171 (Ind. 1984).

The Petitioner has failed to rebut the presumption of competence on the failure of counsel to request sequestration of the jury. There was no showing by a preponderance of the evidence that the failure to request the sequester of the jury had any effect on the fairness of the Petitioner's trial.

The trial Judge adequately and properly admonished the jury on at least seven occasions.

*Allegation 3, Trial Counsel Failed to Present Evidence at Either the Sentencing Stage of the Bifurcated Trial or the Sentencing Hearing.*

*Findings of Fact*

Petitioner asserts that counsel presented no evidence of mitigating circumstances at the sentencing stage of the bifurcated trial or the sentencing hearing. Petitioner testified that he asked counsel to allow his parents to present mitigating factors. Petitioner claims that counsel failed to include the victim's consensual actions as a mitigating factor.

*Conclusions of Law*

The petitioner failed to overcome the presumption of effective assistance of counsel by a preponderance of the evidence.

Trial counsel incorporated mitigating factors admitted into evidence during trial at the sentencing stage of the bifurcated trial. Trial counsel filed objections to the presentence report and moved to correct the report by including mitigating circumstances. Trial counsel presented mitigating circumstances during trial through the testimony of two psychiatrists, the cross-examination of Petitioner's former girfriend, Mary T. Lee, the testimony of Petitioner's father, the social, cultural, educational, religious background of the Petitioner, his alcohol and drug addiction, the Petitioner's age, the Petitioner's attempts at rehabilitation and Petitioner's emotional and behavioral problems. Trial counsel's presentation of mitigating factors was adequate and professionally reasonable. Petitioner fails to meet the *Strickland v. Washington* standard on this allegation.

*Allegation 4, Issues Preserved at the request of Petitioner in his Motion to Correct Errors were Waived on Appeal.*

*Findings of Fact*

Petitioner testified that seven issues preserved at his request in the Motion to Correct Errors were waived by appellate counsel and his first post-conviction relief counsel without his knowledge. Those issues include:

1. The Court erred in overruling and denying the Defendant's motion to dismiss.
2. The Court erred in overruling the Defendant's objection to the admission into evidence of State's Exhibit 47, a coat recovered from the Half-Way House.
3. The Court erred in sustaining the State's objection to the admission into evidence of Defendant's Exhibit B.



4. The court erred in giving to the jury the Court's preliminary instruction concerning the burden of proof on the issue of insanity, which instruction was not numbered.
5. The court erred in giving to the jury the Court's final instructions numbered 3, 9, 11 and 15.
6. The Court erred in modifying the Defendant's tendered instruction numbered 15.
7. The Court erred in overruling and denying the Defendant's motion to reject the verdict and reinstruct the jury.

*Conclusions of Law*

The decision of appellate counsel not to pursue certain issues preserved by the Motion to Correct Errors was strategic and tactical. This Court will not second guess appellate counsel's decision to omit and waive certain appealable issues. When incompetency of counsel is alleged, there is a strong presumption of adequate legal assistance. *Whitlock v. State*, 456 N.E.2d 717, 718 (Ind. 1983). The Petitioner has not overcome this presumption by a preponderance of the evidence. The Petitioner has not met the performance or prejudice prong of the *Strickland v. Washington* test on this allegation.

*Allegation 5. Petitioner was Tried Upon Defective Charging Informations and Proceeded to the Death Penalty Stage Upon Verdicts Indicating a "Non-intentional" Killing.*

*Findings of Fact*

Petitioner claims that he was convicted upon a defective charging Information where no mens rea was alleged. The Defendant was convicted under Count II, Murder, I.C. 35-42-1-1(2). Petitioner claims that he was not charged or found guilty of intentionally killing the victim and therefore does not fit the aggravating factor of Indiana's death penalty statute. Petitioner contends that trial counsel was ineffective for allowing the defective Information to proceed to trial.

*Conclusions of Law*

Petitioner claims the charging information filed was defective. Omitting captions and formal parts, Count II of the Information reads as follows:

> Thomas N. Schiro on or about February 5, 1981, did kill Laura Luebbehusen by beating, striking and strangling the said Laura Leubbehusen, thereby causing her to die by asphyxiation, while the said Thomas N. Schiro was committing and attempting to commit the crime of rape, to-wit: knowingly and by the use of force and the threat of force, having sexual intercourse with the said Laura Luebbehusen, a member of the opposite sex, without the consent of the said Laura Laubbehusen, all in violation of I.C. 35-42-1-1(2).

An Information must state the crime in words of the statute or words that convey a similar meaning. *Burris v. State*, 465 N.E.2d 171, 181 (Ind.1984).

The language of the Information was sufficiently certain to enable the accused, the trial court and the jury to determine the crime for which conviction was sought.

Indiana's death penalty statute is in part at I.C. 35-50-2-9:

> Death Sentences—(a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.
>
> (b) The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery.



The State filed a separate request for the death penalty which specifically identified the aggravating circumstances.

> The crime of Murder, as charged in Count II of the Information filed herein, was committed by the defendant, Thomas N. Schiro, and the following aggravating circumstances exist, which justify the imposition of the death sentence.
>
> (1) The murder of Laura Luebbehusen charged in Count II was intentionally committed by the defendant, Thomas N. Schiro, during the commission of the crime of Rape, as more particularly described in the Information, constituting an aggravating circumstance justifying imposition of the death penalty, as set forth in I.C. 35-50-2-9(b)(1).
>
> WHEREFORE, the State of Indiana prays that the penalty of death be imposed on the defendant, Thomas N. Schiro.

The language of the Information was sufficiently certain to enable the accused, the trial Court and the jury to determine the aggravating circumstances of the death penalty statute.

The Petitioner was convicted for felony murder. The intent to kill is not an element of felony murder. *Pawloski v. State*, 380 N.E.2d 1230 (Ind.1978). The only intent required to be proved in a prosecution for felony murder is the intent to commit the underlying felony. *Brown v. State*, 448 N.E.2d 10 (Ind.1983).

The intent for the underlying felony of rape was adequately alleged in the Information and proved. The Information alleging the death penalty was adequate and satisfied the requirement of intentionally.

The Court finds no ineffective assistance of counsel under this allegation.

*Allegation 6, Petitioner was Denied His Right to Confront the Witnesses and Evidence Against Him as Applied to the Testimony of Linda Gail Summerford and State's Exhibit 62.*

*Findings of Fact*

Petitioner claims that trial counsel's failure to cross-examine Linda Gail Summerford and dispute State's Exhibit 62 were extremely prejudicial to him. Linda Gail Summerford, a surprise State witness, testified that the Petitioner committed an uncharged rape on her. State's Exhibit 62 was a photo array Summerford used to identify Petitioner as the man who raped her. The Petitioner's rape of Summerford was considered an aggravating circumstance by the trial Judge in imposing the death penalty over the jury's recommendation.

*Conclusions of Law*

The decision not to cross-examine Summerford and contest the photographic array was tactical. Petitioner has not overcome the presumption that counsel prepared and executed Petitioner's defense effectively by a preponderance of the evidence. This Court will not speculate on what should have been the defense's proper strategy. A fair trial was not denied the Petitioner by this tactical decision. Prior to Summerford's testimony, Dr. Osanka testified that the Defendant committed as many as 23 acts of rape. The decision not to challenge Summerford did not meet the *Strickland v. Washington* standards for ineffective assistance of counsel.



*Allegation 7, Petitioner was Not Provided as an Indigent, Competent Psychiatric Assistance.*

*Findings of Fact*

Petitioner filed a request to have a psychiatric expert appointed to aid in the preparation and presentation of his defense. This request was denied. A psychiatrist, Dr. Osanka, was hired and paid for by Petitioner's parents.

Dr. Osanka was instrumental in the preparation of Petitioner's defense. Petitioner claims that Dr. Osanka indicated to Petitioner and his family that a sizable sum of money would have to be paid to the psychiatrist for testimony favorable to the Petitioner. Trial counsel was informed about this attempted bribe but did nothing about it according to the Petitioner.

*Conclusions of Law*

Two psychiatrists were appointed as Court's witnesses to examine the Defendant and testify at trial. The Petitioner was provided adequate and competent psychiatric assistance for his insanity defense. Contrary to what the Petitioner suggested in his post-conviction relief testimony, competent psychiatric assistance does not mean that expert evaluations and opinions must be rendered in the defendant's favor.

The alleged shakedown or blackmail by Dr. Osanka is based completely on the questioned credibility of the Petitioner. The Petitioner's testimony was based on layers of out-of-court statements by declarants not present to testify. Petitioner's parents were not called to corroborate the alleged shakedown.

This Court finds that the Petitioner was not denied competent psychiatric assistance and was not denied effective assistance of counsel on this allegation.

*Allegation 8, Members of the Jury were Allowed to View Defendant Shackled During Court Recesses.*

*Findings of Fact*

Petitioner claims to be prejudiced by being viewed in manacles and shackles by the jury on breaks in the proceedings and when being led in or out of the trial courtroom. Trial counsel was aware that the Petitioner was being viewed in shackles by the jury and made no objections. Petitioner complained to counsel about being seen by the jury in shackles.

*Conclusions of Law*

The fact that a defendant has been seen by jurors while being transported in handcuffs is not a basis for reversal, absent a showing of actual harm. *Hartlerod v. State*, 470 N.E.2d 716 (Ind.1984). Reasonable jurors could expect the Petitioner to be in police custody while in the hallway of the courthouse. *Jenkins v. State*, 492 N.E.2d 666 (Ind.1986). A reasonable jury could assume that the Petitioner would be in police custody and under custodial restraint during breaks in the trial and traveling to and from the courtroom. The Petitioner has made no showing of actual harm and has not met the *Strickland v. Washington* standard for ineffective assistance of counsel on this allegation.

*Judgment of the Court*

IT IS NOW ORDERED by the Court that any finding of fact in this order more properly considered as a conclusion of law shall be considered to have been restated as such. Any conclusion of law more properly considered to be a finding of fact shall be considered to have been restated as such.

IT IS FURTHER ORDERED by the Court that the Second Petition for Post-Conviction Relief filed by the



Petitioner, Thomas N. Schiro, on March 5, 1987, be denied on all grounds.

SO ORDERED this 15th day of January, 1988.

/s/ John G. Baker
JOHN G. BAKER
Special Judge
Brown Circuit Court

SUPREME COURT OF INDIANA

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No. 07S00-8807-PC-656

THOMAS N. SCHIRO.

*Appellant*
*(Defendant below)*,

v.

STATE OF INDIANA.

*Appellee*
*(Plaintiff below)*.

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Feb. 8, 1989

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PIVARNIK, Justice.

This direct appeal arises from a denial of post-conviction relief. The history of this cause in this court is extensive. On September 12, 1981, Defendant Schiro was found guilty of the offense of murder while committing, and attempting to commit, the crime of rape. The trial court entered judgment of conviction on the jury's verdict. The jury recommended that the death penalty not be imposed but the trial court overruled that recommendation and ordered the death sentence for Schiro. This court affirmed the trial court's judgment. *Schiro v. State* (1983), Ind., 451 N.E.2d 1047. On November 28, 1983, the United States Supreme Court denied Schiro's writ of certiorari to vacate the death penalty. *Schiro v. Indiana* (1983), 464 U.S. 1003, 104 S.Ct. 510, 78



L.Ed.2d 699. On May 11, 1984, Schiro filed an amended petition for post-conviction relief which was denied by Special Judge James M. Dixon on May 29, 1984. This court affirmed the trial court's denial of post-conviction relief on June 28, 1985. *Schiro v. State* (1985), Ind., 479 N.E.2d 556. On February 24, 1986, the United States Supreme Court denied Schiro's writ of certiorari to vacate the death sentence. *Schiro v. Indiana* (1986), 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355.

Thereafter Schiro instituted a petition for writ of habeas corpus in the United States District Court Northern District of Indiana, South Bend Division. Judge Allen Sharpe remanded to the state court, allowing Schiro to exhaust all available state remedies as required for federal habeas corpus proceedings pursuant to 28 U.S.C. § 2254(b); *Ex Parte Hawk* (1944), 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572. Subsequently, on March 5, 1987, Schiro filed the instant action, his second post-conviction relief petition. He filed the timely motion for change of venue from the trial court and Monroe County Circuit Judge John Baker was appointed special judge, qualified and assumed jurisdiction on March 25, 1987. Schiro's petition for post-conviction relief was denied by Judge Baker.

The issues raised in Schiro's direct appeal to this court are:

1. trial court error in dismissing four allegations of error based on a finding they were *res judicata* or waived as available but not taken in direct appeal at the original post-conviction relief petition;

2. ineffective representation of counsel at trial, in the direct appeal, and in the first post-conviction relief petition;

3. the jury's guilty verdict on felony murder was a conclusive finding of lack of intent such that a possible death sentence was foreclosed; and

4. accumulated error on all above issues which amounts to prejudice warranting reversal.

The post-conviction petitioner bears the burden of establishing the grounds for relief by a preponderance of the evidence. Rule PC 1 § 5. The PC 1 hearing judge is the sole judge of the evidence and the credibility of the witnesses. *Popplewell v. State* (1981), Ind., 428 N.E.2d 15, 16. A petitioner who has been denied PC 1 relief is in the position of one who has received a negative judgment; he will not obtain a reversal unless the evidence on this point is undisputed and leads inevitably to a conclusion opposite to that of the trial court. To prevail on a claim of ineffectiveness of counsel, a petitioner must satisfy both sides of a two-prong test. He must prove counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. Then he must prove that such substandard performance was so prejudicial as to have deprived him of a fair trial. A fair trial is denied when the conviction or sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. *Strickland v. Washington* (1984), 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, *reh. denied* (1984), 467 U.S. 1267, 104 S.Ct 3562, 82 L.Ed.2d 864; *Lawrence v. State* (1984), Ind., 464 N.E.2d 1291.

I

Schiro claims it was erroneous to dismiss four sections of his petition which alleged a) failure of the statute to provide guidelines for consideration of the jury's recommendation and for appellate review of sentences; b) error in admitting a search warrant, affidavit, and physical items; c) error in excluding a handwritten document; and d) error in providing verdict forms. The trial court found



these matters were either *res judicata* or waived as available but not taken in direct appeal or the original PCE petition.

The purpose of the post-conviction relief process is to raise issues not known at the time of the original trial and appeal or for some reason not available to the defendant at that time. Where an item was available to the defendant on direct appeal but not pursued, it is waived for post-conviction review. *Sims v. State* (1988), Ind., 521 N.E.2d 336, 337. An issue which is raised and determined adverse to petitioner's position is *res judicata*. *Ingram v. State* (1987), Ind., 508 N.E.2d 805, 807. In Schiro's direct appeal this court spoke directly of guidelines for considering the jury's recommendation and for appellate review of sentences. Our discussion included the standard of review of death sentences where the court's judgment is contrary to the jury's recommendation, the degree of conclusiveness regarding a jury recommendation of leniency, double jeopardy, where both the jury and the judge consider the imposition of the death penalty where their views are in conflict, and the finding that the judge independently considers the same facts on the same standards as the jury. *Schiro*, 451 N.E.2d at 1054-1058. Questions of legality of the search warrant, affidavit, and seizure of physical items were fully discussed and disposed of on direct appeal. Schiro's contention concerning the failure of the trial court to admit as evidence a certain hand-written document was fully presented and disposed of in the opinion on direct appeal. This court noted the document was given to a witness by a third party who said Schiro wrote it. The witness did not authenticate the document through knowledge of handwriting or presence at its penning, or any other accepted basis to authenticate a piece of handwriting. The only basis he had to believe the document was the out-of-court declaration of the person who gave it to him. We upheld the trial court's finding an insufficient foundation existed to permit admission of the document.

Finally, the direct appeal opinion considered and disposed of, adverse to Schiro, his contention he was harmed by lack of some necessary verdict forms. The entire record of the trial and the original PCR petition were put into evidence in the instant cause. The trial court had the ability to read the opinion and compare issues, and the power to dismiss these issues disposed of in this court's prior proceedings. The trial court properly found all four issues were so disposed and there was no error in dismissing them as *res judicata*.

II

Schiro claims in the instant cause there were several instances of inadequate assistance of counsel at the trial level and that subsequent counsel were deficient in not raising these issues on direct appeal or original post-conviction action. The state responds Schiro was not entitled to raise these issues in a subsequent post-conviction petition and moreover, when examined, these allegations fail to show prejudice or performance below the norms of professional representation. Schiro claims there were serious matters he brought to his attorney's attention before and during trial and that trial counsel brushed them off and failed to raise them. The record shows that after all these alleged events, when asked at the end of trial if he was satisfied with his representation, Schiro responded in the positive. He then accepted the same lawyer to prosecute his appeal. He now says counsel failed to present certain issues he wanted raised on appeal. However, when the time came to present his original post-conviction petition, Schiro failed to allege even one of these trial or appellate level matters.

The court of appeals recently stated in *Alston v. State* (1988), Ind.App. ,521 N.E.2d 1331, 1335, that they would not "take a step backward and create a new vehicle by which a defendant could use a PCR to attack a previous PCR on the grounds of incompetency of counsel



in that PCR hearing, and then use yet a third PCR to attack the competency of counsel of the second PCR and so on in perpetuity." In *Lane v. State* (1988), Ind., 521 N.E.2d 947, this Court noted that ineffective assistance of trial counsel would have been an issue available in the post-conviction petition. "Lane's allegation of ineffective assistance is clearly an attempt to circumvent Rule PC 1, section 8, in order to present evidence on issues that had been waived." We stated further, "Lane cannot evade PC Rule 1, section 8, just by typing the words 'ineffective assistance of counsel.'" *Id.* 521 N.E.2d at 949.

If a petitioner is to prevail on a claim of ineffectiveness of counsel he must show he was denied a fair trial when the conviction or sentence resulted from a breakdown in the adversarial process which rendered the result unreliable. *Strickland*, 466 U.S. at 696, 104 S.Ct. at 2069, 80 L.Ed.2d at 699; *Lawrence*, 464 N.E.2d at 1294 To meet this burden, a petitioner must overcome by strong and convincing evidence a presumption that counsel has prepared and executed his client's defense effectively. *Williams v. State* (1987), Ind., 508 N.E.2d 1264, 1266-67. The question is factually oriented. This court does not speculate about what may have been the most advantageous strategy. Isolated bad tactics or inexperience do not necessarily amount to ineffective assistance of counsel. *McChristion v. State* (1987), Ind., 511 N.E.2d 297, 300.

(A)

In the second PC hearing, Schiro claims he told his counsel facts which should have been used in his defense but were not. He claimed there was evidence the victim consented to the sexual encounters and this could have been proven by checking with bartenders and clerks at bars. He further claimed Mary Lee, his girlfriend, told him she was coerced into her testimony which included his admission to, and description of, the crimes committed upon her. However, Schiro never gave the names of the

establishments he and the victim allegedly visited, or identified anyone in any of those establishments who could verify his story. Further, Mary Lee appeared as a witness attempting to help him. She recounted nothing of what Schiro told her which he had not himself told other psychiatric expert witnesses in a thirty-page confession that was referred to as an "autobiography."

Schiro claimed insanity as his defense at trial. The claims he presently makes regarding the probative value of the evidence he allegedly gave his lawyer, are totally inconsistent with the insanity defense and all other evidence in the case. Psychiatric testimony at trial showed Schiro was a manipulative and incredible individual; the trial court was therefore justified in treating his assertions as questionable and unsubstantiated. There was ample evidence justifying the trial court's deciding the credibility issue, and we find no reason to disturb it. Furthermore, even if we assume *arguendo* that Schiro did bring these matters to his counsel's attention, it was a rational strategy decision to not develop two unpromising and essentially useless leads which could be more damaging than helpful to Schiro.

(B)

Schiro also claims ineffective assistance in counsel's failure to sequester the jury. Counsel was under no duty to request sequestration in a capital case and petitioner must show prejudice by failure to move for it. *Burris v. State* (1984), Ind., 465 N.E.2d 171, 193, *cert. denied*, 469 U.S. 1132, 105 S.Ct. 816, 83 L.Ed.2d 809. To support his contention. Schiro presented a few newspaper clippings showing regional newspapers reported the trial. Included were articles about the jury's final recommendation and the judge's final sentence, though these reports obviously did not affect the jury during its deliberations. He located seven jurors but did not present any evidence that any juror ignored the judge's instructions or became exposed to any outside influence from individ-



uals or media sources. Because he failed in his burden of proof to show prejudice, we must find the trial court correctly rejected this contention of ineffective representation of counsel.

(C)

Schiro claims counsel did not present an adequate mitigation defense after the penalty phase conviction. The PCR court found Schiro failed to prove counsel's decision was unreasonable or prejudicial. The court's findings of fact noted significant mitigating evidence was presented in the guilt phase of the trial and was argued by counsel in the penalty phase. Schiro raised the insanity defense, thereby bringing into issue at the guilt phase all those matters of character, background, and history that normally are reserved for the penalty phase. It is a defensible strategic decision to use all this evidence at the guilt phase to try to obtain an acquittal and not reintroduce all the same evidence at the penalty phase. The trial court was justified in finding counsel's performance in this area did not depart from reasonable norms of representation, and therefore no prejudice was shown.

(D)

Schiro also identifies seven issues he claims were preserved for appeal but not presented by appellate counsel. This issue of ineffective appellate representation was available for presentation in the original post-conviction petition and therefore is waived in this petition. *Lane*, 521 N.E.2d at 949. Furthermore, appellate counsel need not raise on appeal an issue that in his professional judgment appears frivolous or unavailing. *Ingram v. State* (1987), Ind., 508 N.E.2d 805, 808-809. Schiro cites no evidence from the record showing unreasonable professional judgment on these seven issues. He does not give the basis on which he concludes the matters include any reversible error; he does not state the basis for the motion to dismiss or to set aside the verdict, or any of the in-

structions at issue, or the basis for objection to the evidentiary rulings.

One of the issues involved a state's rebuttal witness, Linda Summerfield, who detailed an armed sexual assault which Schiro perpetrated against her. Schiro claims counsel should have more effectively cross-examined her and objected to an array of photos from which she picked him as her assailant. First, there is no showing as to what information might have been gained by further cross-examination of this witness, and second, Summerfield's testimony did no more than repeat one instance of as many as twenty-three instances of other unrelated sexual assaults Schiro committed which he himself related in a thirty-page statement.

(E)

Schiro also cites counsel's failure to respond to his family's assertion the psychiatric witness, Dr. Osanka, tried to "shake him down" for an extra fee as a condition for the most favorable testimony. The trial judge found this story to be incredible. It rested on multiple hearsay as out-of-court declarations attributed by Schiro to his parents. The fact of this alleged "shakedown" was not shown in evidence and Schiro's parents never testified or told anyone else that this incident occurred.

(F)

Finally, Schiro claims counsel was deficient in not preventing jurors from seeing him transported in shackles. It has been held that reasonable jurors can expect a criminal defendant to be in restraints during breaks and while being transported. *Jenkins v. State* (1986), Ind., 492 N.E.2d 666, 669. We have distinguished between a prisoner appearing in court in bonds or shackles as in *Walker v. State* (1980), 274 Ind. 224, 229, 410 N.E.2d 1190, 1193-1194, and when being transported and seen incidental to that. *Sweet v. State* (1986), Ind., 498



N.E.2d 924, 929, requires a showing of actual harm where jurors see a defendant being transported in restraints. The trial court was justified in finding Schiro demonstrated no inadequacy in representation in any of these areas.

III

Schiro claims the aggravating circumstance of intentional killing could not be considered at the penalty phase because the felony murder as charged lacked the requisite element of *mens rea* in committing the underlying rape. He attempts to apply a fundamental double jeopardy rule that a conviction of lesser included offense is an acquittal of the greater offense. An aggravating circumstance, however, is not an offense. A person convicted of either type of murder, that is, intentional killing under IC 35-42-1-1(1), or felony murder IC 35-42-1-1(2), can be shown to contain the aggravator of intentional killing justifying the imposition of the death penalty. One can be found guilty of felony murder where the intention was to commit the underlying felony without necessarily intending to commit the murder. It does not follow, however, that one convicted of felony murder cannot be shown to have intentionally killed the victim while perpetrating the felony. IC 35-50-2-9 provides in pertinent part:

> (a) The State may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.
>
> (b) The aggravating circumstances are as follows:
>
> (1) The defendant committed the murder by *intentionally* killing the victim while committing or attempting to commit arson, burglary, child molesting,

criminal deviate conduct, kidnapping, rape, or robbery. (emphasis added).

The crimes of murder and felony murder each contain elements different from the other but are equal in rank. One is not an included offense of the other and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider. Count I here, under IC 35-42-1-1(1), did not charge Schiro with intentionally killing but with knowingly killing. Thus the jury in the guilt phase never confronted the issue of intentional killing and its verdict could not be considered to have included any conclusion on that issue. The court then properly proceeded to the penalty phase pursuant to IC 35-50-2-9, and the jury determined that the aggravating circumstance existed in that Schiro committed the murder by intentionally killing the victim while committing or attempting to commit rape and criminal deviate conduct. In this same statute, § (9)(e) provides that the judge is not bound by the recommendation of the jury, however, he must base his decision upon the same standard the jury was required to consider. The jury made their finding and the trial judge subsequently made his. There is therefore no error presented on this issue.

IV

Schiro claims that even if individually none of the above issues raise sufficient prejudice to require relief, cumulatively they do. Since we find no error on any of the issues above, no prejudicial error is presented in their accumulation.

The trial court is affirmed.

SHEPARD, C.J., and GIVAN, J., concur.

DeBRULER, J., dissents with separate opinion in which DICKSON, J., concurs.



DeBRULER, Justice, dissenting.

In this case appellant was charged in three separate counts. Count I charged murder as a knowing killing of the victim. Count II charged murder as a killing in the course of a rape of the same victim. Count III charged murder as a killing in the course of deviate sexual conduct. The jury was charged on all counts, and returned but a single verdict, namely guilty on Count II. As to the other counts, the verdict was entirely silent in regard to guilt or innocence of appellant. The law requires that the jury verdict be deemed the legal equivalent of verdicts that the defendant is not guilty of the felonies charged in Counts I and III. *Buckner v. State* (1969), 252 Ind. 379, 248 N.E.2d 348. *Smith v. State* (1951), 229 Ind. 546, 99 N.E.2d 417. *Cichos v. State* (1965), 246 Ind. 680, 208 N.E.2d 685, which appears to hold to the contrary, is not, but is a waiver case. There, this Court held that the double jeopardy claim against retrial was waived by filing a motion for new trial. Even if *Cichos* is valid law today, it does not apply here because appellant took no action between the silent jury verdict on the murder charge of knowingly killing and the judge's sentencing finding of the aggravating circumstance that appellant had intentionally killed in the course of the rape, which one might draw a waiver.

At the trial, the prosecution used every resource at its disposal to persuade the jury that appellant had a knowing state of mind when he killed his victim. It failed to do so. At the sentencing hearing before the jury it had an opportunity to persuade the jury that appellant had an intentional state of mind when he killed his victim. The jury returned a recommendation of no death. At the sentencing hearing before the judge, the prosecution had yet another opportunity to demonstrate an intentional state of mind, and finally succeeded. In my view, the silent verdict of the jury on Count I, charging a knowing state of mind, must be deemed the constitutional equiva-

lent of a final and immutable rejection of the State's claim that appellant deserves to die because he had an intentional state of mind. That verdict acquitted appellant of that condition which was necessary to impose the death penalty under this charge. *Bullington v. Missouri,* 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). The difference in the two states of mind is insignificant and too esoteric in this instance. In the one, a person acts with awareness that he is so acting. In the other, a person acts with an objective to so act. I.C. 35-41-2-2. To accord the difference, one would have to believe that a person can be presently unaware that he is strangling another, while at the same time having a goal presently in mind to strangle such other person.

I would reverse the judgment and remand with instructions to grant post-conviction relief in the form of a new sentence of years upon the conviction for felony murder.

DICKSON, J., concurs.

Costs of this proceeding are assessed against the Respondent.

All Justices Concur.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF INDIANA

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Civ No. 583-588

THOMAS SCHIRO,

v.

RICHARD CLARK and
INDIANA ATTORNEY GENERAL

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**AMENDED PETITION**

1. Name and location of court which entered the judgment of conviction under attack Brown County Circuit Court, Nashville, Indiana
2. Date of judgment of conviction October 2, 1981
3. Length of sentence Death
4. Nature of offense involved (all counts) Count I—Murder; Count II—Murder While Committing and Attempting to Commit Rape; Count III—Murder While Committing and Attempting to Commit Criminal Deviate Conduct; Convicted of Count II only.

* * * *

12. State *concisely* every ground on which you claim that you are being held unlawfully. Summarize *briefly* the *facts* supporting each ground. If necessary, you may attach pages stating additional grounds and *facts* supporting same.

* * * *

## GROUND XIV.

The sentence of death in this case is unreliable and suspect with a real possibility that it was imposed out of whimsy, passion or prejudice upon improper considerations and without receiving the particular and qualitative review necessary to pass constitutional muster. The death sentence as applied in this case violates the Petitioner's rights and privilege to fundamental fairness, due process, equal protection, to not be twice put in jeopardy of life, against being compelled to be a witness against himself, and to be confronted with the witnesses against him, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

* * * *

C. The sentencing authority allegedly made a finding that the Petitioner had intentionally killed when the advisory jury, clearly by inference, made a positive finding that the requisite intentionality necessary for the death sentence did not exist in this case.

* * * *

F. The Petitioner was effectively put through three (3) sentencing hearings and was placed at least twice in jeopardy of his life.

* * * *

SUPPORTING FACTS:

* * * *

C. In addition to felony murder, the Petitioner was charged with knowingly killing the victim. The jury did not find the Petitioner guilty of knowingly killing the victim. Knowingly is a lesser culpability than intentionally. Thus, the jury made a positive finding that the State did not prove beyond a reasonable doubt the Petitioner intentionally killed the victim. Such a finding is supported by the jury's unanimous recommendation



against the death penalty. The judge was precluded from then finding that the Sate did prove beyond a reasonable doubt that the Petitioner intentionally killed the victim. It should be noted that Indiana's penalty phase is more like a trial than Florida's because Indiana requires unanimity and a specific standard of proof.

D. It is clear the jury made a positive negative finding as to a knowing killing then unanimously rejected the death sentence. At no time was this considered by the trial court or the reviewing court. No consideration whatsoever was given the jury's recommendation. The only mention of it was in terms of improperly considered matters.

* * * *

F. The proceedings against the Petitioner consisted of a penalty phase before the jury on the issue of the death sentence, a sentencing hearing before the judge on the issue of the death sentence, and a proceeding before the judge on remand for additional findings of fact on the issue of the death sentence. It should be noted that the Petitioner was not present for the remand proceeding. It has been noted that Indiana's death phase is more like a trial than Florida's and the trial court's independent process to determine the necessary findings to insure the death sentence constitute double jeopardy. These proceedings further run afoul of double jeopardy by forcing the Petitioner to run the gauntlet not twice but three times. In addition the final proceeding held in the trial court ran afoul of due process.

* * * *

I. The State offered no additional evidence at the death phase of trial or at the sentencing hearing to distinguish the felony murder by proving an intentional killing after the jury had already rejected a knowing killing. Thus, the same felony was used to make the felony murder death eligible.

* * * *

(Signature of counsel and petitioner omitted in printing)

UNITED STATES DISTRICT COURT
N.D. INDIANA
SOUTH BEND DIVISION

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Civ. No. S83-588

THOMAS SCHIRO,
*Petitioner,*

v.

RICHARD CLARK, and INDIANA ATTORNEY GENERAL,
*Respondents.*

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Dec. 26, 1990

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**MEMORANDUM AND ORDER**

ALLEN SHARP, Chief Judge.

On December 28, 1983, this petitioner, Thomas Schiro, filed the within petition seeking relief under 28 U.S.C. § 2254. This case has been pending since the counsel has been appointed for this petitioner. The full state court record consisting of eight (8) volumes has been filed and examined pursuant to the mandates of *Townsend v. Sain*, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963). Numerous proceeding have been held, the most recent one an oral argument in Lafayette, Indiana on November 8, 1990.

This petitioner, Thomas Nicholas Schiro, was convicted of murder while committing or attempting to commit rape in the Brown Circuit Court, at Nashville, Indiana, on or about September 12, 1981. Although the jury in a bifurcated death penalty proceeding did not recommend the death penalty, the Honorable Samuel R. Rosen, the Judge of the court, imposed the death penalty on this petitioner on October 2, 1981.



On direct appeal to the Supreme Court of Indiana, the aforesaid conviction was affirmed in *Schiro v. State*, 451 N.E.2d 1047 (Ind.1983), *cert. denied*, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983).

An amended petition for post-conviction relief was filed in the Brown Circuit Court on May 11, 1984, and was heard by the Honorable James M. Dixon acting as special Judge. Judge Dixon denied that petition for post-conviction relief after a hearing on May 29, 1984, and the Supreme Court of Indiana affirmed the denial of post-conviction relief as reported in *Schiro v. State*, 479 N.E.2d 556 (Ind.1985), *cert. denied*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986) (Brennan and Marshall, J., dissenting).

When the second appeal got to the Supreme Court of Indiana in *Schiro v. State*, 479 N.E.2d 556 (1985), Justice Prentice concurred in the denial of post-conviction relief and in the opinion authored by Chief Justice Givan thereon. Only Justice DeBruler dissented, citing *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), *Mullane v. Central Hanover Bank and Trust Company*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865, (1950), and *Armstrong v. Manzo*, 380 U.S. 545, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965). A further petition for post-conviction relief was filed in the state court. Special Judge John Baker of Bloomington, Indiana, now a judge on the Court of Appeals of Indiana, heard that petition and denied same which was appealed to the Supreme Court of Indiana, which affirmed the decision of Judge Baker in *Schiro v. State*, 533 N.E.2d 1201 (Ind.1991), *cert. denied*, —— U.S. ——, 110 S.Ct. 268, 107 L.Ed.2d 218 (1989). In that appeal, the Supreme Court, speaking through Justice Pivarnik, denied claims of ineffective

assistance of counsel made under the Indiana Post-Conviction Remedy Rule, and Justice DeBruler again dissented, primarily on the ground that the recommendation of the jury was an acquittal, triggering the protections of the double jeopardy clause. In this effort, he picked up the concurring vote of Justice Dickson.

Numerous proceedings have been held in this case, including a final oral argument in Lafayette, Indiana, on November 8, 1990, and this petitioner has had the benefit of able and experienced appointed counsel throughout these proceedings. An amended petition seeking relief under 28 U.S.C. § 2254 was filed here August 19, 1986, and that petition and the return addressing it form the issues to be decided by this court.

It is basic and elementary that this court is here engaged in collateral review which must focus only on constitutional issues properly raised and exhausted. *See Bell v. Duckworth*, 861 F.2d 169 (7th Cir. 1988), *cert. denied*, 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989). There is nothing conceptual with reference to cases in which the death penalty is imposed that changes the basic scope of this court's collateral constitutional review under § 2254. As a matter of reality, it is to be noted that a good number of steps have been taken by the Court of Appeals in this circuit to insure that this variety of federal habeas review is done in a most careful fashion. In this vein, this court has made a full independent review of all of the state record under *Miller v. Fenton*, 474 U.S. 104, 106 S.Ct. 445, 88 L.Ed.2d 405 (1985).

It is also basic that this court does not act as a general court of common law review, but acts under a specific federal statute that limits its consideration to errors properly preserved and exhausted that are of a constitutional dimension. The Supreme Court of Indiana, in the direct appeal of this case in *Schiro v. State*, 451 N.E.2d 1047, the basic facts are stated as follows:



The evidence most favorable to the State reveals that the body of Laura Luebbehusen was discovered in her Evansville home on the morning of February 5, 1981. Laura's roommate, Darlene Hooper, and Darlene's ex-husband, Michael Hooper, discovered the body. Darlene had spent the previous night at Michael's apartment. The two found the home in great disarray, with blood covering the walls and floor. Laura's body was found near the door, her legs spread apart, and her slacks were pulled down around her ankles. The police were called and recovered a large broken vodka bottle, a handle and metal portions of an iron, a partially consumed bottle of wine, a pint bottle of vodka, and empty alcoholic beverage cans and bottles in the garbage.

Dr. Albert Venables testified as the pathologist who performed the autopsy on the victim. Dr. Venables found a number of contusions on the body but he stated that Laura Luebbehusen had been strangled to death. A number of wedge-shaped injuries on the head were most likely caused by a blunt instrument. Dr. Venables also found lacerations on the nipple and a thigh, and a tear in the vagina, all caused after the victim's death. A forensic dentist confirmed that the injury to the thigh was a human bite mark.

A few days after Laura Luebbehusen's body was discovered, her Toyota automobile was found about one block away from the Second Chance Halfway House. Defendant Schiro was a resident at the Halfway House, which tried to assist former criminals in finding employment and remove any obstacles that they face when released from prison. It also housed people who were sent there for treatment and counseling in lieu of sending them to prison from the local courts.

The director of the Halfway House, Ken Hood, asked a counselor to check the sign-in and sign-out sheets to see if any of the residents had been out at the time of the Luebbehusen murder. While the counselor was examining the sign-out sheets, Schiro approached him and asked if he could talk about something that was very "heavy." The counselor told Schiro to speak to Ken Hood. Schiro admitted to Hood that he had killed Laura Luebbehusen. Hood contacted the police and took Schiro down to the station.

Jimmy Wolff was Schiro's roommate at the Halfway House. Wolff testified that Schiro arrived at the room about 5:00 a.m. on February 5, 1981, the day Laura Luebbehusen's body was found. Shiro told Wolff he had to go downstairs and straighten things out so he would not get in trouble about being out all night.

After Schiro confessed to Ken Hood, the police searched his room and determined that the blood on a jacket found in the room was consistent with that of the victim, but not consistent with Schiro's blood. While in a holding cell in Vanderburgh County Jail, Schiro told another inmate that he had been drinking and taking Quaaludes the night of the killing, and had intercourse with the victim before and after killing her.

Mary T. Lee, Schiro's girlfriend, testified that shortly after the murder was committed, Schiro visited her in Vincennes and admitted that he killed Laura Luebbehusen. Schiro told Lee that he gained entrance to the victim's home on the pretext that his car had broken down. After pretending to use the telephone to call for assistance, Schiro asked if he could use the bathroom. He came out of the bathroom exposed but told Laura not to be alarmed because he was "gay." This story Schiro made up in



order to gain the victim's confidence. Schiro further told Luebbehusen that some "gay" friends had bet him that he could not "get it on" with a woman and he just wanted to win the bet. Schiro said Luebbehusen talked about homosexualty and Luebbehusen told Schiro that she, too, was "gay." Darlene Hooper, Luebbehusen's roommate, had testified earlier that Laura was a practicing lesbian and that she had an aversion to men.

Schiro roamed through the house and came back with two dildoes and had Laura Luebbehusen try to insert one into his anus. He found the experience too painful and told Leubbehusen he would make love to her instead. A dildo, identified at trial as the one taken from the house, was recovered in Vincennes. Mary Lee told the police where Schiro had disposed of it after showing it to her. After intercourse, Luebbehusen tried to leave but Schiro stopped her, dragged her back into the bedroom, and raped her. During this time the two had been drinking. When the liquor ran out, they left to go buy more and returned to the house. Schiro fell asleep but woke up when Luebbehusen again attempted to leave. Schiro forced her to remain and she fell asleep on the bed. While Luebbehusen slept, Schiro felt the urge to kill her, grabbed the vodka bottle and beat her on the head until the bottle broke. He then beat her with the iron and when she resisted his attack, finally strangled her to death. Schiro then dragged Luebbehusen into another room, undressed her, and sexually assaulted the corpse.

*Schiro*, 451 N.E.2d at 1049-1050.

An issue was raised with regard to the so-called proportionality. The validity of any such issue in this case appears to have been laid aside by the Supreme Court of the United States in *Pulley v. Harris*, 465 U.S. 37, 104

S.Ct. 871, 79 L.Ed.2d 29 (1984), and reaffirmed in *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). The issue also appears to have emerged in regard to the double jeopardy clause of the Fifth Amendment of the Constitution for the United States, as made applicable to the states under the Fourteenth Amendment. The complaint seems to be that somehow the double jeopardy clause of the Fifth Amendment was violated. For a discussion of that clause recently by this court, *see United States v. Crumpler*, 636 F.Supp. 396 (N.D.Ind.1986). *See also Grady v. Corbin*, —— U.S. ——, 110 S.Ct. 2084, 109 L.Ed.2d 548 (1990). This argument seems to spring from the action of the Supreme Court of Indiana when by order of February 11, 1983, it remanded to the Brown Circuit Court for a written entry reflecting the reasons for this death sentence. Somehow it is contended that this action violates the Double Jeopardy Clause. Even more far-fetched is the argument that somehow this petitioner had the right to be present when the Brown Circuit Court entered its written findings on that remand. He had no more right to be present then than he had a right to be present when the justices of the Supreme Court conferred on his case.

In any event, it appears that *United States v. Cosentino*, 869 F.2d 301, 309 (7th Cir.1989), has answered that double jeopardy question adverse to this petitioner. Where a new entry was made on the basis of evidence already in the record, there is neither a constitutional right to be present when that formal entry is made by the state trial judge nor is the double jeopardy clause violated, the practice of appellate courts in remanding cases for more explicit findings is commonplace in both criminal and civil appeals. The Supreme Court of the United States has upheld a death sentence entered pursuant to a remand even when there is a deficiency in the first sentence. *See Poland v. Arizona*, 476 U.S. 147, 106 S.Ct. 1749, 90 L.Ed.2d 123 (1986). It does not appear in



this case that this remand was because of insufficient evidence, but it was designed to give the Supreme Court of Indiana a more explicit statement of the reasons for this death sentence. Such is altogether proper action by the Supreme Court of Indiana. *See Lockhart v. Nelson*, 488 U.S. 33, 109 S.Ct. 285, 102 L.Ed.2d 265 (1989). The Supreme Court has also dealt with the double jeopardy concept where there is a new sentencing hearing in *Hitchcock v. Dugger*, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

Certainly, if a new hearing can be constitutionally held, the Supreme Court of Indiana is well within its authority to request a more explicit written finding from the sentencing trial judge on the basis of the evidence already presented. Certainly, the double jeopardy clause of the Fifth Amendment of the Constitution of the United States does not inhibit that process. Neither is the confrontation clause of the Sixth Amendment of the Constitution of the United States violated in such a situation. *See Kentucky v. Stincer*, 482 U.S. 730, 107 S.Ct. 2658, 96 L.Ed.2d 631 (1987).

A far more fundamental concern is the simple fact that the jury recommended against the death penalty and Judge Rosen chose to impose one. The Indiana statute permits that to happen and that statute on its face passes constitutional muster. In this regard, it is necessary to here set out the statement of Judge Rosen:

> PRONOUNCEMENT OF SENTENCE
>
> The Defendant, having been found guilty by a jury on the 12th day of September, 1981, and the Court having entered judgment of conviction of the crime Murder/Rape, and on September 15, 1981, the Court having heard arguments by Jerry Atkinson, Deputy Prosecuting Attorney for the State of Indiana, and Michael Keating, for the Defendant, and both the State and counsel for Defendant having

moved to incorporate the evidence of the trial, which motion was granted by the Court, and the jury having returned their unanimous recommendation to the Court that the death penalty not be imposed on the Defendant, and the Court having reviewed the evidence of the trial thereafter, and having considered the written presentence report, gives the following reasons for the imposition of the sentence: The jury in its verdict of guilty of Murder Rape, rejected the plea of insanity. The testimony of the Court appointed Psychiatrists, Charles H. Crudden, M.D., and Bernard R. Woods, M.D., both indicated that the Defendant is in good contact with reality and is not psychotic or insane. His conversations were relevant and coherent, with a good understanding of the charges against him and the possible consequences of these charges, as well as an understanding of the roles of the defense attorney, the prosecuting attorney, the jury and the Judge. Their prognosis for the Defendant is very poor and they concluded that this Defendant is now and will be a dangerous person in the community. David Crane, M.D., the attorney and psychiatrist, indicated that from a review of the autobiographical statement by the Defendant submitted into evidence by the Defendant's attorney, which indicated that Defendant had committed numerous rapes and acts of criminal deviate conduct, is a dangerous person, but like the Court appointed psychiatrists, found the Defendant to be sane at the time of the offense. The Defendant's own witness, a psychologist, Dr. Frank Osanka, indicated that the Defendant is 'overpowered by the need for erotic release.' Mary T. Lee, with whom the Defendant had lived, testified to vicious sadistic assaults on her infant under the age of two years, by immersing the said infant under water until the child stopped breathing and then resuscitating the infant. Mary T.



Lee also testified that he had knocked out her front teeth with his fist. Linda Gail Summerford, a witness for the State, testified at length of a violent rape committed by the Defendant, in the presence of her child, a victim of cerebral palsy, and under threat of harm to said child. In her testimony she identified the Defendant and Defendant's counsel had no questions and made no objections to her testimony. At no time has the Defendant indicated any remorse. These are aggrevating circumstances.

The fact that the Defendant committed these crimes with gruesome, sadistic acts, including necrophilia, but nevertheless wore gloves so that there would be no trace of fingerprints, and transported said gloves to his girlfriend, Mary T. Lee, for disposal, as he had likewise transported the dildo to Vincennes to be thrown in a waste barrel behind a bar, indicated the Defendant's thoughtful planning to escape being caught. This is an aggravating circumstance.

The Defendant had been previously convicted of robbery, a class C felony, in Vanderburgh County, and was on work release when arrested for this crime. This is an aggravating circumstance.

This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, *except* when the jury left the courtroom. In the Court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced the jury in its recommendation.

The age of the Defendant is twenty years. This is not a mitigating circumstance, nor was the age of the victim, twenty-eight years, a mitigating circumstance.

> For all of the above reasons, the Court now sentences the Defendant to death. The sentence is required by the Statutes of the State of Indiana, as all of the aggravating circumstances listed herein by far outweigh any mitigating circumstances.
>
> The Court has no choice but to follow the law.
>
> The Defendant is to be executed as by law provided on the 28th day of January, 1982, before sunrise.
>
> The Defendant is remanded to the custody of the Sheriff.

The petitioner through his counsel has been given the rare opportunity to have some sworn testimony by the sentencing judge which was elicited in post-conviction proceedings in the state court. One would hope that does not become a regular tactic. A sentencing judge who imposes a death sentence has enough to worry about and should not be put on trial after the fact. It does not appear to this court to be necessary that a sentencing judge himself be put on trial and under oath before yet another judge to explain any sentence, including the death penalty. That is in the opinion of this Judge, not a very good way to properly manage the relationship between a trial judge and litigants and a trial judge and a reviewing appellate court. The procedure really creates many more problems than it solves, and such is the case here.

On the sentencing process, a presentence report was made available to this petitioner and his counsel which contained a mass of information, including an admission by the petitioner that he tried to manipulate people. An opportunity was provided to the petitioner and his counsel to comment on or object to the contents of that presentencing report. In fact, such a pleading was filed with reference to statements of a Dr. Crane. There is certainly evidence of the manipulative aspect of this petitioner's personality before the sentencing trial court.



A double jeopardy argument is made with reference to the recommendation of the jury vis-a-vis the sentence of the trial judge. It is argued that the first judgment of the jury should preclude or bar a second judgment of the trial judge. However, the Indiana death penalty statute in Indiana Code § 35-50-2-9 places the sentencing function on the trial judge. A copy of the death penalty statute is marked Appendix "A" and attached hereto. The Supreme Court of the United States has specifically found that there is no constitutional requirement for so-called jury sentencing. *See Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). The Supreme Court of Indiana made the same decision in the first direct appeal at 451 N.E.2d at 1055. The so-called verdict of the jury in both Florida and Indiana are advisory. The same is also true in Alabama and the Supreme Court of the United States dealt with that statute in *Baldwin v. Alabama*, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). In *Baldwin*, 472 U.S. at 372, 105 S.Ct. at 2728, the complaint was that the sentencing judge gave too much consideration to the jury's recommendation. However, the Supreme Court of the United States directly answered the constitutional question here posed in *Spaziano*, 468 U.S. at 447, 104 S.Ct. at 3155. Paralleling that conclusion, the Supreme Court of Indiana was constitutionally correct in its ruling on the direct appeal in 1983.

In his concurring and dissenting opinion at 451 N.E.2d at 1064, Justice DeBruler details the argument that the recommendation of the jury against the imposition of the death penalty is in fact a "verdict" that invokes the double jeopardy clause of the Fifth Amendment of the Constitution of the United States as the same is incorporated into the Fourteenth Amendment. The argument is comprehensively and well-stated but most respectfully, that argument has been categorically rejected by a majority in the Supreme Court of Indiana. In his concurring

and dissenting opinion, Justice Prentice parallels the argument made by Justice DeBruler and adds a number of points that find their foundation primarily in state law.

The mandate in Indiana appears to be that a sentencing trial judge in imposing the death penalty must find by clear and convincing evidence reasons for declining to follow the jury's recommendation. *See Martinez Chavez v. State*, 534 N.E.2d 731 (Ind.1989). An argument is made along the way that Judge Rosen considered the Indiana statute to mandate rather than allow the death penalty. That is not a correct reading of the Indiana statutes and there is nothing in this record to indicate that Judge Rosen finally had that understanding of the statute. Judge Rosen obviously felt very strongly that based on the record and the case which he had seen and heard, the death penalty *should* be imposed.

In the trial itself on the merits, there is a claim that the state trial judge erred constitutionally in the admission of incriminatory statements made by the director of the work release program in which Schiro was serving a sentence at the time of the murder. It is contended that the admissions thereof were in violation of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Those statements were not in violation of *Miranda*, 384 U.S. at 436, 86 S.Ct. at 1602. As a matter of fact, the Supreme Court has gone considerably farther than the state trial judge did here. In *Minnesota v. Murphy*, 465 U.S. 420, 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984), the petitioner was questioned by a probation officer and confessed to a crime and that testimony was not prohibited by *Miranda*. In this case, the petitioner voluntarily sought to talk to someone, that person being one Kenneth Hood. The petitioner initiated the conversation and that finding of fact was made explicitly by the Supreme Court of Indiana in 451 N.E.2d at 1061. Such finding of fact is presumed to be correct under 28 U.S.C. § 2254(d), but this court has made an independent examination of



the record in that regard under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446, and is in complete agreement with the aforesaid finding by the Supreme Court of Indiana in this regard.

In this case, that officer was merely listening to a voluntary statement initiated by the petitioner and *Miranda* was not violated. This is not an example of state-sponsored interrogation. In this instance, the voluntariness of the statement was clearly established under the mandates of *Colorado v. Connelly*, 479 U.S. 157, 107 S.Ct. 515, 93 L.Ed.2d 473 (1986).

An attack is made upon the verdict forms that were submitted. The jury was given a one-page form containing three paragraphs of possible verdicts and a blank space for the date and foreperson's signature under each paragraph. The jury considered the following language:

> We, the jury, find the defendant not guilty.
>
> We, the jury, find the defendant guilty of Murder while the said Thomas N. Schiro was committing and attempting the crime of rape as charged in Count II of the information.
>
> We, the Jury, find the defendant guilty while the said Thomas N. Schiro was committing and attempting to commit the crime of criminal deviate conduct as charged in Count III of the information.

It is extremely doubtful that this rises to the level of a constitutional challenge. The jury was told that there could be a finding of guilty but mentally ill and that that applied to all three theories of murder. The instructions and verdict forms must be examined as a whole to determine whether they pass constitutional muster. *See California v. Brown*, 479 U.S. 538, 107 S.Ct. 837, 93 L.Ed.2d 934 (1987). It is important to note that this issue was not raised prior to the retirement of the jury.

An effort is made to challenge the original charging information in a state court as being unverified. A facial

examination clearly shows that it was indeed verified. The initial information dated and filed February 10, 1980, has been examined here. On April 9, 1981, there were requests for the death penalty filed by the Chief Deputy Prosecutor of Vanderburgh County, Indiana. That issue was never raised in the state courts and has been raised here for the first time. In *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989); *rehr'g denied*, 490 U.S. 1031, 109 S.Ct. 1771, 104 L.Ed.2d 206 (1989). Justice O'Connor stated:

> A rule announced in *Harris v. Reed* [489 U.S. 255, 109 S.Ct. 1038, 103 L.Ed.2d 308 (1989)], assumes that a state court has had the opportunity to address a claim that is later raised in a federal habeas proceeding. It is simply inapplicable in a case such as this one where the claim was *never* presented to the state courts. (emphasis added) 489 U.S. at 299 [109 S.Ct. at 1068-69]

It does not appear that the other concurring judges in *Teague*, 489 U.S. at 288, 109 S.Ct. at 1060 are at odds with the above quoted statement of Justice O'Connor. Their focus was primarily on the problem of retroactivity of the rule established in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Therefore, it seems clear that when *Teague*, 489 U.S. at 288, 109 S.Ct. at 1060, and *Harris*, 489 U.S. 255, 109 S.Ct. 1038, are considered in tandem issues that were never raised in the state courts are the proper subject of procedural default in this collateral review under § 2254. Were it to be otherwise, there could never be an end to this kind of collateral review. If a defendant convicted in a state court proceeding could file continuous assertions of issues and claims not previously raised in the state courts, and then claim the benefits of *Harris*, it would be very difficult if not impossible, to ever bring a § 2254 proceeding to an end. *Sanders v. United States*, 373 U.S. 1, 83 S.Ct. 1068, 10 L.Ed.2d 148 (1963) might provide a cutoff



in such cases. *See also Kuhlmann v. Wilson*, 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986). Certainly, this is a subject that has caught the attention of a special committee chaired by retired Justice Lewis F. Powell and a legislative solution to this kind of problem which pending in the Congress of the United States. However, under *existing* law, it appears that issues have not been raised in the state courts can and should be procedurally defaulted under the above analysis of *Harris v. Reed*, and *Teague v. Lane*.

Another effort is made to challenge whether *mens rea* was alleged in the charging information or is required by the relevant Indiana statute. Such issue does not appear to have been raised in any way in the state courts and under the above reasoning in *Harris* and *Teague*, cannot be presented here for the first time. It is subject to procedural default. There can be no question, however, that *mens rea* was an element of the crimes charged and that there was more than enough proof of its existence in the record in this case. Whatever conceptual merit this argument might have, it does not rise to a constitutional level in this case. *See Tison v. Arizona*, 481 U.S. 137, 107 S.Ct. 1676, 95 L.E.2d 127 (1987).

There is a charge that there is some variety of a due process violation, possibly a double jeopardy one, in that three Counts of murder with three allegedly different theories were charged when there was only one killing and one victim. This issue was never raised in the state courts and is raised for the first time here and is subject to procedural default under the above analysis of *Harris v. Reed* and *Teague v. Lane*. In any event, there was a finding of guilty *only* on Count II.

An issue under the Fourth Amendment with reference to a search warrant is raised. It is alleged that the affidavit to obtain the warrant, the return of the warrant and the items seized under the warrant were improperly allowed into evidence. It is alleged that the person who

issued the warrant was not a neutral and detached magistrate. It is further alleged that in part, the warrant was based on information provided by Kenneth Hood, above referred to, which was obtained in violation of the *Miranda* rule. Since there was no *Miranda* violation in that regard, that part of the argument here fails.

It appears that the Fourth Amendment issue in this regard was fully and fairly litigated in the state courts under the mandates of *Stone v. Powell*, 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976). Once that decision is made, it is not to be litigated here. *See also Willard v. Pearson*, 823 F.2d 1141 (7th Cir.1987); *Wallace v. Duckworth*, 778 F.2d 1215 (7th Cir.1985).

On the first direct appeal, this issue is dealt with at 451 N.E.2d at 1061. Even aside from *Stone*, 428 U.S. at 465, 96 S.Ct. at 3038, the decisions of the Supreme Court of the United States in *Illinois v. Gates*, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983), *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987) would authorize the issuance of a search warrant. Although it is doubtful if it is necessary to go to *United States v. Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), for salvation in this regard, certainly it also would provide a constitutional basis for the admission of the fruits of this search warrant.

There is some argument made that this issue was not fully and fairly presented to the state courts in the first instance under *Castille v. Peoples*, 489 U.S. 346, 109 S.Ct. 1056, 103 L.Ed.2d 380 (1989), and *Cruz v. Warden of Dwight Correctional Center*, 907 F.2d 665 (7th Cir.1990). The court chooses not to bottom its decision in this regard on that concept, but rather bottoms it on the *Stone*, 428 U.S. at 465, 96 S.Ct. at 3038, concept.

The next issue raised has to do with refusal of the state trial court to admit a letter allegedly written by the petitioner, but not admitted into evidence because of the failure to have the letter properly authenticated. This issue



was presented to the Supreme Court of Indiana on direct appeal and resolved there at 451 N.Ed.2d at 1061 and 1062. It is highly doubtful if it raises a constitutional issue. At most it presents an issue of the state law of evidence which should not be interfered with by the federal judiciary on collateral review. It cannot be shown that its exclusion undermines the basic and fundamental fairness of these proceedings.

Another issue is raised here for the first time regarding the modification of a certain instruction tendered by the petitioner. Again, this issue is foreclosed by the aforesaid reasoning in *Harris*, and *Teague*. In this regard, the defendant/petitioner tendered his instruction 15 which stated:

> The Defendant, Thomas Schiro, has not taken the witness stand as a witness. His failure to do so shall not, in any manner, be considered by you in arriving at your verdict, nor should you consider his appearance and demeanor in the courtroom during trial in arriving at your verdict.

In giving this instruction, the trial court struck therefrom "nor should you consider his appearance and demeanor in the courtroom during trial in arriving at your verdict." No authority is cited by this petitioner to demonstrate any errors here. Any error is not of the constitutional variety.

At trial, the state presented a rebuttal witness in the testimony of Linda Summerfield, sometimes called Linda Summerford. She allegedly was raped by the petitioner and recognized his picture as her attacker in the newspapers. A photographic lineup was conducted and she picked out Schiro's picture in that display. There is a question here as to the Fourteenth Amendment duty to disclose exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976). *See also United States v. Jack-*

*son*, 780 F.2d 1305 (7th Cir.1986); *Palmer v. City of Chicago*, 755 F.2d 560 (7th Cir.1985); *United States v. Fairman*, 769 F.2d 386 (7th Cir.1985); and *Carey v. Duckworth*, 738 F.2d 875 (7th Cir.1983). However, it does not appear to this court that this evidence is *ex* culpatory. In fact, it was very much *in* culpatory. It should be noted that this is not a case in which the alibi defense was imposed as was the case in *Mauricio v. Duckworth*, 840 F.2d 454 (7th Cir.1987) *cert. denied*, 488 U.S. 869, 109 S.Ct. 177, 102 L.Ed.2d 146 (1988). Neither is the concept of reciprocal discovery in the alibi context of *Wardius v. Oregon*, 412 U.S. 470, 93 S.Ct. 2208, 37 L.Ed.2d 82 (1973) applicable. Any earlier nondisclosure of the existence of the testimony of Linda Summerfield (Summerford) violated none of the due process rights of this petitioner. This court chooses not to bottom its decision in this regard on procedural default, since there was some reference to it in the state record. The petitioner apparently in an effort to have the jury conclude that he was mentally deranged, admitted to 23 sexual attacks of which the incident with Linda Summerfield (Summerford) was only one. In any event, the due process clause was not violated. Even assuming the existence of some error in failing to disclose this rebuttal witness, the same is harmless beyond a reasonable doubt.

Constitutional errors in a criminal trial are grounds for reversal unless they are "harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967). The petitioner is entitled to a fair trial not a perfect one. *Delaware v. Van Arsdall*, 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986). *See also Sulie v. Duckworth*, 864 F.2d 1348, 1356 (7th Cir.1988); *Ortega v. O'Leary*, 843 F.2d 258, 262 (7th Cir.1988), *cert. denied*, 488 U.S. 841, 109 S.Ct. 110, 102 L.Ed.2d 85 (1988). The harmless error rule "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Van Arsdall*, 475 U.S. at 681, 106 S.Ct. at 1436. *See also United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1017 (7th Cir.1988).



The intial inquiry for the court then "is whether absent the constitutionally-forbidden evidence, honest and fair-minded jurors might very well have brought in not-guilty verdicts." *Burns v. Clusen*, 798 F.2d 931, 943 (7th Cir. 1986) (citing *Chapman v. California*, 386 U.S. 18, 26, 87 S.Ct. 824, 829, 17 L.Ed.2d 705 (1967)). The court must determine " 'whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction.' " *United States ex rel. Ross v. Fike*, 534 F.2d 731, 734 (7th Cir.1976) (quoting *Fahy v. Connecticut*, 375 U.S. 85, 86-87, 84 S.Ct. 229, 230, 11 L.Ed.2d 171 (1963)). This circuit generally requires other evidence of guilt to be "overwhelming" before concluding a constitutional error was harmless. *See Sulie*, 864 F.2d at 1359; *Smith v. Fairman*, 862 F.2d 630, 639 (7th Cir.1988), *cert. denied*, 490 U.S. 1008, 109 S.Ct. 1645, 104 L.Ed.2d 160 (1989); *United States ex rel. Savory v. Lane*, 832 F.2d 1011, 1020 (7th Cir.1987); *Burns*, 798 F.2d at 943; *United States v. Shue*, 766 F.2d 1122, 1133 (7th Cir.1985). But in making this determination the court is not to engage in a reweighing of the evidence to determine the impact on the jury's verdict. *Fencl v. Abrahamson*, 841 F.2d 760, 769 (7th Cir.1988). Rather, the court must examine all the evidence to determine the impact of the objectionable evidence on the jury's verdict. *Id. See also United States v. de Ortiz*, 883 F.2d 515 (7th Cir.1989); and *United States v. Check*, 882 F.2d 1263 (7th Cir.1989).

There is also a constitutional issue raised with regard to the sequestration of the jury and the admonitions with reference to media accounts. It should be remembered that this case was tried in Nashville, Indiana, in one of

the smallest and least populated counties in the State of Indiana, a town with a weekly newspaper and no local radio or television station. The record in this case in regard to any possible prejudicial publicity is light years away from *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), and *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). This issue was raised primarily under the guise of ineffective assistance of counsel and was dealt with in the third opinion by the Supreme Court of Indiana at 533 N.E.2d 1201 et seq. It must be examined under the mandates of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). In *United States v. Grizales,* 859 F.2d 442, 447 (7th Cir.1988), Judge Eschbach, speaking for the court stated:

> The Supreme Court has instructed that in evaluating the performance of a trial attorney we are to "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2054. Appellant "has a heavy burden in proving a claim of ineffectiveness of counsel." *Jarrett v. United States,* 822 F.2d 1438, 1441 (7th Cir.1987) (citing *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064). The Supreme Court has further cautioned appellate courts to resist the temptation to "second-guess" the actions of trial counsel after conviction. *Id.* It is clear that the performance of trial counsel should not be deemed constitutionally deficient merely because of a tactical decision made at trial that in hindsight appears not to have been the wisest choice. *See Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065; *United States v. Kennedy,* 797 F.2d 540, 543 (7th Cir.1986).

*See also United States v. Adamo,* 882 F.2d 1218 (7th Cir.1989). There is no showing that any juror was exposed to media coverage during trial. The Supreme Court



of Indiana expressly made that finding at 533 N.E.2d at 1206. That finding, while presumptively correct, is also supported on the basis of an independent examination of the record under *Miller v. Fenton,* 474 U.S. at 104, 106 S.Ct. at 446. *See Rushen v. Spain,* 464 U.S. 114, 104 S.Ct. 453, 78 L.Ed.2d 267 (1984).

The burdens on a trial judge in a death penalty case are enormous. The appellate courts and the federal reviewing courts should not engage in second-guessing about how to best manage this awfully difficult judicial event. Each locale and each case has its own life and set of circumstances. There is nothing in this record to indicate that Judge Samuel Rosen violated the Constitution of the United States in his management, including lack of sequestration of this jury, during this trial. Most seasoned trial judges avoid sequestration of juries like the plague. Such is fraught with both personal and judicial problems. It is only when the factual record demonstrates that nothing short of sequestration will suffice should a reviewing court find a constitutional error. No basis to compel sequestration is to be found in this record.

An issue is raised with reference to the claim that the state trial court failed to give this indigent petitioner expert psychiatric assistance. Even assuming that this somehow raises a constitutional right, this petitioner did have psychiatric assistance in the preparation of his defense in the person of Dr. Frank Osanka. The testimony challenging the credibility of Dr. Osanka was that of the petitioner himself. That testimony was specifically found to be incredible by the state trial judge who heard him. *See Schiro,* 533 N.E.2d at 1207. Assuming the best of this for this petitioner, his constitutional rights were not violated in that regard. There were two independent court-appointed psychiatrists who evaluated this petitioner as to both his competency to stand trial and his sanity at the time of the trial. Those psychiatrists did not conclude that the petitioner was insane but certainly the Constitution of the United States does not guarantee to

a defendant charged with a serious death penalty crime the right to have a psychiatrist who will claim that he is insane. The mere statement of that proposition indicates its utter absurdity.

It should also be noted that the appointment of two independent court-appointed psychiatrists meets the constitutional demands of *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985).

Much is made of the so-called rocking/non-rocking situation. That brief factual slice of the record probably has gotten considerably more attention than it deserves. Manipulation is not a basis in Indiana for imposing a sentence of death and was not used and the Supreme Court of Indiana specifically found that it was not used in this case. *See* 479 N.E.2d at page 559. The Supreme Court of the United States has said in a general way that a sentence may be enhanced if the sentencing trial judge believes that the defendant's testimony was perjured. *See United States v. Grayson*, 438 U.S. 41, 98 S.Ct. 2610, 57 L.Ed.2d 582 (1978). However, when a sentencing judge does enhance a sentence for that reason, a defendant is not generally entitled to a hearing on that issue. *See United States v. Bortnorsky*, 879 F.2d 30, 43 (2nd Cir.1989).

There is a right to have a sentence based on reliable and accurate information. *See Tucker v. United States*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972). *See also United States v. Harris*, 558 F.2d 366 (7th Cir.1977).

One of the issues raised post-conviction and here is that Judge Samuel Rosen exhibited bias and prejudice against this particular petitioner because of an alleged ex parte and post-trial statement that "the boy is going to fry." Certainly, there is a longstanding right to an impartial judge, as defined by Chief Justice Taft more than 60 years ago in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). In this regard, that court stated:



> All questions of judicial qualification may not involve constitutional validity. Thus matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion. *Wheeling v. Black*, 25 W.Va. 266, 270. But it certainly violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial, pecuniary interest in reaching a conclusion against him in this case.

No such problem exists in this case. What is involved here is reactions of this state trial judge after the fact rather than before the fact. Criminal trials that are envisioned under the Sixth Amendment of the Constitution of the United States are enormously human events. Judges who preside over such criminal trials which involve the grossest kind of violence that is rested by one human being on another are not required to put their potential for moral indignation on the back shelf. When a defendant is charged with a serious crime, regardless of how grotesque the charge may be and how heinous the conduct of that defendant may be, it is the sworn task of a presiding trial judge to comply as evenhandedly as possible with the mandates of the due process clause in following the law and the basic concepts of fairness that inhere. It would certainly be a sad day for either the state or federal judiciary if judges were required to be or become valueless and morally neutral. It would also be a sad day for the state and federal judiciary if a veteran trial judge somehow through the process of experience became immune to normal feelings of moral indignation at heinous and violent criminal conduct.

The record in this case most certainly justified these private feelings of moral indignation by this veteran state court judge. However, Judge Rosen erred, although not

in a constitutional sense. In a case tried by this Judge, *United States v. Murzyn*, 631 F.2d 525 (7th Cir.1980), an issue was raised with regard to a comment that this Judge made in the course of that trial. Chief Judge Bauer (then Judge) of the United States Court of Appeals suggested at page 535 that the comment would have been better left unsaid. Nonetheless, the verdict of guilty in *Murzyn* was upheld on appeal, and that bit of judicial conduct did not create a constitutional defect.

Understanding the cultural environment that pervades places like Nashville, Indiana, apparently Judge Rosen made a gratuitous ex parte out-of-court comment to a newspaper reporter and the deputy prosecuting attorney. The post-conviction state judge heard testimony from Judge Rosen, the newspaper reporter and the deputy prosecuting attorney in regard to this incident. Based on that testimony, that post-conviction relief state judge made a specific finding of fact that there was no bias or prejudice by Judge Rosen. That decision was upheld by the Supreme Court of Indiana. However, this does not excuse the fact that state trial judges who preside over cases in which the death penalty is or may be imposed have enormously delicate responsibilities. Speaking ex parte after the fact to a newspaper reporter or a deputy prosecutor does not serve that proper judicial function. This court has examined this slice of the record with the greatest of care and delicacy and is convinced that there is very substantial support for the conclusion of the state courts in this regard and is convinced that there was no violation of the constitutional right as defined in *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437. The facts in *Tumey* are a far cry from those here.

The petitioner was found guilty of the charge in Count II. Somehow it is now attempted to extrapolate the fact that there was no finding of guilty under Count I of the information into a finding that there was no intentional killing and therefore the death penalty is not appropriate. In order to get to that result, a number of large jumps in logic and fact are necessary. The facts are that the



petitioner was found guilty in Count II. The jury did not fill out a verdict form on Counts I or Count III. Somehow this becomes a double jeopardy claim. This petitioner was not acquitted by Counts I or III and neither was he found guilty. He was found guilty on Count II.

It is a constitutional condition precedent to an application of the double jeopardy clause of the Fifth Amendment of the Constitution that there be an acquittal. Whether there is an acquittal depends largely on state law. *See Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983). *See also United States ex rel. Young v. Lane*, 768 F.2d 834 (7th Cir.1985), *cert. denied*, 474 U.S. 951, 106 S.Ct. 317, 88 L.Ed.2d 300 (1985). The Supreme Court of Indiana in the first direct appeal stated that the jury's recommendation was "an intermediate step" in the process toward the court's final judgment. *See* 451 N.E.2d at page 1056. There is an analogy, although not a perfect one, between this situation and inconsistent verdicts. *See United States v. Reed*, 875 F.2d 107 (7th Cir.1989). There is simply no constitutional merit to the argument that somehow the failure of the jurors to render any decision on Counts I and III some way or other constitutes an acquittal which extrapolates into a double jeopardy argument that frees this defendant petitioner.

When it is all said and done, the judge of the Brown Circuit Court engaged in a fully constitutionally adequate sentencing procedure that has been fully and carefully explained on the record and in writing. It does not suffer from any constitutional deficiencies which causes this court to set it aside on collateral review. This case has now been to the Supreme Court of Indiana three times. While there are justices on that court who have expressed concerns, the majority of that court in each instance has declined to undermine this sentence of death. That court's recent history indicates that it is perfectly capa-

ble of reversing a death sentence. *See Smith v. Indiana*, 547 N.E.2d 817 (Ind.1989); *Cooper v. Indiana*, 540 N.E.2d 1216 (Ind.1989); and *Martinez Chavez v. State*, 534 N.E.2d 731 (Ind.1989). It is also very clear that Justices of the present Supreme Court of Indiana are more than capable of rendering individualized judgment in criminal death penalty cases. The record here is evidence of that kind of review. The Supreme Court of the United States has denied certiorari in this case three times. This court would especially note the statement of Justice Stevens in *Schiro v. State*, —— U.S. ——, 110 S.Ct. 268, 107 L.Ed.2d 218 (1989). With the greatest respect for Justice John Paul Stevens, it is the fervent hope of this court that the issues about which he expressed concern have been dealt with here in the fashion that he suggested.

An issue is raised with regard to the effective assistance of counsel under *Strickland*, 466 U.S. at 668, 104 S.Ct. at 2054, which requires both unprofessional conduct and actual prejudice. *See United States ex rel. Cross v. DeRobertis*, 811 F.2d 1008, 1013-14 (7th Cir. 1987). That issue was thoroughly examined in the third opinion of the Supreme Court of Indiana at 533 N.E.2d at 1207. While this court cannot rely on the correctness of the legal judgment in that regard, it can presume as correct the historical facts under 28 U.S.C. § 2254(d). However, under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446, this court has made an independent examination of the record in this regard and finds the various attempts to nitpick after the fact the conduct of defense counsel to be little more than that. This defense counsel was confronted with a most difficult situation and did a job which met Sixth Amendment professional standards.

There is a charge that this defense counsel failed to submit mitigating evidence during a sentencing hearing, relying on *Dillon v. Duckworth*, 751 F.2d 895 (7th Cir.



1985), *cert. denied*, 471 U.S. 1108, 105 S.Ct. 2344, 85 L.Ed.2d 859 (1985). In *Dillon*, there was no insanity defense and the assertion of such a defense opens a very wide door with regard to the character and history of a defendant. During the guilt phase of the trial, the personal history of the defendant was brought forward, including testimony by his father. Defense counsel argued the mitigating factors to the jury and to the judge at sentencing. A defendant has a right to effective assistance of counsel at sentencing. *See Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986). However, strategic decisions are accorded substantial deference. *See Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987). There is a presumption that effective assistance of counsel is rendered until the contrary is shown and the burden is on the petitioner to do so. *See Santos v. Kolb*, 880 F.2d 941, 943 (7th Cir.1989). Certainly, a defense counsel is not required to present mitigating evidence when none exists. *See Smith v. Dugger*, 840 F.2d 787, 795 (11th Cir.1988). *United States v. Myers*, 917 F.2d 1008 (7th Cir.1990). It is further alleged that somehow the prosecution coerced Mary Lee into testifying and there was a failure to disclose so-called exculpatory evidence in this regard. This was raised as a claim of ineffective assistance of counsel in the state courts where it was claimed that the petitioner told his counsel that the state had threatened to take away Lee's child if she did not cooperate, but that the attorney did nothing about it. This claim appears to be at odds with the one made in the state court. Either the petitioner and his counsel knew about Mary Lee and it was therefore undisclosed, or they did not know and it should have been disclosed. Apparently, they can't have it both ways. In any event, there was no prejudice to the petitioner by the testimony of Mary Lee, some of which was indeed favorable to him. Testimony was also cumulative with reference to the testimony of

the court-appointed psychiatrist. Certainly, her testimony did not change the outcome in this trial in favor of the petitioner. The record in this case, however, fails to disclose any coercion. In fact, the Supreme Court of Indiana found to the contrary at 533 N.E.2d page 1206. While that historical fact is presumptively correct under Title 28 U.S.C. § 2254(d), an independent examination of the record under *Miller v. Fenton*, 474 U.S. at 104, 106 S.Ct. at 446 discloses that it is correct in any event.

Last of all, there is an attempt to make an issue with regard to the handcuffing and shackling of the petitioner outside the courtroom during breaks in court proceedings and going to and from the courthouse. There is no evidence in the record that any juror saw the petitioner in that condition. In another case, *Osborne v. Duckworth*, 567 F.Supp. 427 (N.D.Ind.1983), this court was very concerned about an incident in the Adams County Courthouse in Decatur, Indiana, and granted a habeas corpus petition under 28 U.S.C. § 2254 because of it. That decision was reversed in an unpublished opinion by the Court of Appeals. *See* 757 F.2d 1292 (7th Cir.1985).

Finally, the prosecuting authorities have a substantial interest in seeing that a defendant on trial for a capital case remains in custody and does not escape from a small, rural courthouse and the adjacent jail. *See Holbrook v. Flynn*, 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed. 2d 525 (1986). *See also Clark v. Wood*, 823 F.2d 1241, 1245 (8th Cir.1987), *cert. denied*, 484 U.S. 945, 108 S.Ct. 334, 98 L.Ed.2d 361 (1987).

It should be noted that counsel's memorandum filed on September 4, 1990, on behalf of the petitioner deals exclusively with the question of intentionality. Although of some constitutional dimension, counsel's memorandum contains more of a question of complying in rather straightforward criminal law terms with the requirements of the Indiana death penalty statute. Petitioner asserts that Judge Rosen did not make a specific finding of fact of an intentional killing. The Supreme Court of Indiana



ruled in *Fleenor v. State*, 514 N.E.2d 80 (Ind.1987), that Indiana's death penalty statute survives a constitutional challenge because it requires a finding of specific intent.

The first time the Supreme Court of Indiana reviewed the petitioner's case on direct appeal, it found that, "with the submission of the *nunc pro tunc* entry the trial court properly followed the required procedures in imposing the death sentence. The record justifies the finding of the aggravating circumstances that Thomas Schiro intentionally killed Laura Luebbehusen." *Schiro v. State*, 451 N.E.2d 1047, 1059 (Ind.1983). This issue was held to be *res judicata* on petitioner's third post-conviction review. *Schiro v. State*, 533 N.E.2d 1201 (Ind.1989).

This court agrees with the Supreme Court of Indiana's determination that Indiana's death penalty statute is constitutional and that Judge Rosen complied with it in sentencing Thomas Schiro.

I.C. § 35-50-2-9 states:

> a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one of the aggravating circumstances alleged.
>
> b) The aggravating circumstances are as follows:
>
> > 1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape, or robbery.

It is apparent that Justice Stevens and Justice DeBruler are judicially squeamish about the procedure under Indiana law, whereby a sentencing trial judge may impose

a death sentence even after a jury has made a contrary recommendation. As a matter of federalism, the General Assembly of the State of Indiana has the option to enact such a procedure which on its face does not violate the due process clause of the Fourteenth Amendment, the Sixth Amendment, or the Eighth Amendment of the Constitution of the United States. Given the basics of federalism, this court should not disturb that state established procedure. *See Younger v. Harris*, 401 U.S. 37, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971).

With that procedural process established, the factual record must clearly support the imposition of the death penalty. The sentencing trial judge should not ignore the recommendation of the jury. However, that sentencing authority is fixed in that judge and not in the jury. The realities of the situation are that the sentencing judge faces a more rigorous standard in imposing the death penalty in the face of a contrary jury recommendation. The factual record must clearly justify the death sentence and the reasons given by the sentencing judge must be appropriate ones. The primary focus must be on the factual record as the foundation for the reasons stated. The values involved are far too important to become immersed in minor formalities. The Supreme Court of Indiana simply wanted from the sentencing trial judge a more complete statement of reasons for the imposition of the death penalty and it got same. Such procedure did not invoke the double jeopardy clause of the Fifth Amendment of the Constitution of the United States.

The reasons given for the imposition of the death penalty by the sentencing trial judge, both orally and in writing, have been fully set forth here. Those reasons spring from the factual record, are clearly reflected therein, and meet the constitutional standards currently applied by the Supreme Court of the United States in comparable cases.

It is a part of the *state* law of this case that the non-action of the jury on Counts I and III does not constitute



an acquital. It is not here necessary to write a constitutional treatise on the double jeopardy clause based on a hypothetical that some effort is being made to again try this petitioner on Counts I and III because that situation does not confront this court. In the reality of criminal prosecutions, it is commonplace for multiple and indeed alternative criminal charges to be submitted to a jury and for the jury to return a verdict on less than all of the charges submitted. It is not necessary for this court to determine whether there is perfect symmetry in the case law of Indiana in this subject area. In *this* case, *this* jury found *this* petitioner guilty of Count II and did not act on Counts I and III. The death penalty was imposed on Count II. There is nothing in the Fourteenth or Fifth Amendment of the Constitution of the United States that *compels* this court to label that non-action on Counts I and III as an acquittal for Fifth Amendment double jeopardy purposes. The Supreme Court of Indiana, with Justice DeBruler dissenting, did not so label it and a decent respect for the basic concepts of federalism does not compel this court to do otherwise.

Justice Stevens quotes Justice Powell, now retired, in stating that special and careful attention is required in regard to the consideration of death penalty cases. This court is in total agreement. No one can argue with those suggestions. The record in this case certainly reflects nearly a decade of state and federal court actions and reviews. More of the same will follow this decision. Notwithstanding the demands for special and careful review, this court must apply to the best of its ability and knowledge contemporarily established constitutional standards under the Eighth Amendment of the Constitution of the United States in its collateral review under 28 U.S.C. § 2254. With all deference and respect, it is the view here that such has been done.

In all of this review, it must be remembered that it was this veteran state trial judge who presided over

all of the trial court proceedings resulting in the determination of guilt an dit was he and not the reviewing appellate court and not this court, who saw all of the witnesses, heard and dealt with this case literally in all of its flesh and blood dimensions. In the precise areas of credibility determinations, the same should rest primarily and fundamentally with him and not with the reviewing courts, except upon a determination of a constitutional error.

There is no *constitutional* basis to disturb the imposition of the death penalty by this state trial judge in this case under 28 U.S.C. § 2254. Therefore, the writ must be DENIED. IT IS SO ORDERED.

## APPENDIX A

35-50-2-9 Death sentence

Sec. 9 (a) The state may seek a death sentence for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson (IC 35-43-1-1).

(B) Burglary (IC 35-43-2-1).

(C) Child molesting (IC 35-42-4-3).

(D) Criminal deviate conduct (IC 35-42-4-2).

(E) Kidnapping (IC 35-42-3-2).

(F) Rape (IC 35-42-4-1).



(G) Robbery (IC 35-42-5-1).

(H) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, fireman, judge, or law enforcement officer, and either:

(A) the victim was acting in the course of duty; or

(B) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

(A) under the custody of the department of correction;

(B) under the custody of a county sheriff;

(C) on probation after receiving a sentence for the commission of a felony; or

(D) on parole;

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The victim of the murder was less than twelve (12) years of age.

(12) The victim was a victim of any of the following offenses for which the defendant was convicted:

(A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.

(B) Kidnapping (IC 35-42-3-2).

(C) Criminal confinement (IC 35-42-3-3).

(D) A sex crime under IC 35-42-4.

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in, or consented to, the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.



(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

(e) If the hearing is by jury, the jury shall recommend to the court whether the death penalty should be imposed. The jury may recommend the death penalty only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

The court shall make the final determination of the sentence, after considering the jury's recommendation, and the sentence shall be based on the same standards that the jury was required to consider. The court is not bound by the jury's recommendation.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court

shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, the court shall sentence the defendant to death only if it finds:

(1) that the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances exists; and

(2) that any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

(h) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The death sentence may not be executed until the supreme court has completed its review. *As amended by P.L. 332-1987, SEC. 2; P.L. 320-1987, SEC. 2; P.L. 296-1989, SEC. 2; P.L. 138-1989, SEC. 6; P.L. 1-1990, SEC. 354.*



UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

Date: May 8, 1992

BEFORE: HONORABLE WALTER J. CUMMINGS, Circuit Judge

HONORABLE HARLINGTON WOOD, JR., Circuit Judge*

HONORABLE FRANK H. EASTERBROOK, Circuit Judge

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No. 91-1509

THOMAS SCHIRO,
*Petitioner-Appellant*

v.

RICHARD CLARK, Superintendent,
and INDIANA ATTORNEY GENERAL,
*Respondents-Appellees*

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Appeal from the United States District Court
for the Northern District of Indiana,
South Bend Division

No. 83 C 588, Judge Allen Sharp

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**JUDGMENT—WITH ORAL ARGUMENT**

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this court that the judgment of the District Court is AFFIRMED, in accordance with the decision of this court entered this date.

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*** Judge Wood, Jr., assumed senior status on January 16, 1992, which was after oral argument in this case.**

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

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No. 91-1509

THOMAS SCHIRO,
*Petitioner-Appellant,*
v.

RICHARD CLARK, Superintendent,
and INDIANA ATTORNEY GENERAL,
*Respondents-Appellees.*

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Argued Oct. 15, 1991

Decided May 8, 1992

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Before CUMMINGS, WOOD, Jr.,* and EASTERBROOK, Circuit Judges.

CUMMINGS, Circuit Judge.

A broken iron, a shattered vodka bottle, pictures of the lifeless naked body of Laura Luebbehusen covered with blood and bruises, a warning note left for a friend—these trial exhibits relate the nightmarish facts of the case before us.

An Indiana jury convicted Thomas Schiro of the rape and murder of 28-year-old Evansville, Indiana resident, Laura Jane Luebbehusen. For this crime the trial judge sentenced Schiro to death despite the jury's recommendation that Schiro receive a sentence of life imprisonment. Schiro challenged the trial court's imposition of the death penalty in the Indiana Supreme Court, one on direct appeal and two additional times on collateral review. The Indiana Supreme Court affirmed Schiro's conviction and sentence in each case, and the Supreme Court of the United States denied Schiro's petition for writ of certiorari from each of the three Indiana Supreme Court judgments. Schiro sought post-conviction relief from the federal district court for the Northern District of Indiana pursuant to 28 U.S.C. § 2241 and 28 U.S.C. § 2254. In a decision on the merits, Chief District Court Judge Allen Sharp denied Schiro's petition for habeas corpus relief and issued a certificate of probable cause to appeal pursuant to 28 U.S.C. § 2253 and Rule 22(b), Federal Rules of Appellate Procedure. On appeal this Court's jurisdiction stems from 28 U.S.C. § 1291.

Because this case involves the death penalty, and because of the views of three Supreme Court Justices (Brennan, Marshall, and Stevens), we have exercised the meticulous care that such review requires, see *Schiro v. Indiana*, 493 U.S. 910, 913 n. 9, 110 S.Ct. 268-270 n. 9, 107 L.Ed.2d 218 (1989) (Stevens, J., respecting denial of certiorari), and have examined the record in its entirety. After thorough review, and for the reasons set forth below, we affirm the judgment of the district court.

I.

A. *Facts*

The evidence adduced at trial viewed in the light most favorable to the state's case against the defendant reveals the following facts.[1] On February 4, 1981, Thomas

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* Judge Wood, Jr., assumed senior status on January 16, 1992, which was after oral argument in this case.

[1] This Court interprets the facts in the light most favorable to the state's case against the defendant. However, our presentation of the facts, like that of the Indiana Supreme Court, must necessarily rely upon the defendant's account of the events as related

Schiro was serving a three-year suspended sentence for robbery, a class C felony, at the Second Chance Halfway House in Evansville, Indiana. R. 113 (pre-sentence investigation report), R. 889-891 (testimony of Kenneth Hood).[2] That facility houses criminals sent for counseling and treatment rather than incarceration. *Id.* at R. 888-889. While in the work-release program, Schiro worked across the street from Laura Luebbehusen's home. R. 1067-1069 (testimony of Robert Wheeler), R. 204-205 (testimony of Kenneth Hood).

At approximately 7:00 p.m. on February 4, Schiro went to an Alcoholics Anonymous meeting. R. 1435 (testimony of Mary Lee). Instead of staying for his 8:00 p.m. meeting, Schiro went to a liquor store and stole an alcoholic beverage. *Id.* at R. 1435, 1437. He took the liquor with him and went to see "quarter movies," which were characterized as hard core pornography. *Id.* at R. 1435, 1437-1439, R. 1743 (testimony of Dr. Frank Osanka). A woman who worked as a cashier at the quarter movie porn shop threw Schiro out when Schiro exposed himself to her. *Id.* at R. 1743. From there Schiro went directly to Ms. Luebbehusen's apartment. R. 1439 (testimony of Mary Lee). The time then was approximately 9:30 p.m. *Id.*

Schiro knocked on Ms. Luebbehusen's door and asked if he could use her phone on the pretext that his car would not start. R. 905-906 (testimony of Kenneth Hood). R. 1425 (testimony of Mary Lee). After he pretended to use the phone, Schiro asked to use the bathroom. R. 1425-1426 (testimony of Mary Lee). When he came out of the bathroom Schiro was exposed and Luebbehusen became freightened. *Id.* at R. 1426. In an attempt to calm her, Schiro told Luebbehusen that he did not want to hurt her, that he was gay, and that he was just trying to win a bet that he could "get it on" with a woman. *Id.* Schiro went through the small apartment looking for drugs and money. *Id.* at R. 1746. He came back with drugs and two dildos. *Id.* Schiro told Luebbehusen to drink some liquor and take drugs as he did. *Id.* at R. 1745-1746, 1748. Schiro also told Luebbehusen to insert a dildo into his anus but he found that very painful. *Id.* at R. 1746-1747. Luebbehusen told Schiro that she was gay, that she had been raped as a child, that she had never had sex before, and that she did not want to have sex. *Id.* at R. 1745, 1747. Schiro then raped her. *Id.*[3] When Schiro left the room, Lubbehusen tried to leave but Schiro pulled her back in the house, dragged her by her hair, told her not to try to leave again and raped her a second time. *Id.* at R. 1749. When the liquor ran out, Schiro took her with him to get some more. R. 1441 (testimony of Mary Lee). When they returned to Luebbehusen's home Schiro raped her a third time and then passed out on the couch. R. 1428 (testimony of Mary Lee), R. 1738, 1751 (testimony of Dr. Frank Osanka). When Schiro woke up, Luebbehusen was dressed and headed out the door. R. 1428 (testimony of Mary Lee). Luebbehusen told Schiro that she would not turn him in and was just going to find her girlfriend. *Id.* at 1430. Schiro wouldn't let her leave and Schiro believed that she then fell asleep. R. 1750 (testimony of Dr. Frank Osanka). At that time Schiro decided that he had to kill her so that she couldn't report the rapes.

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to persons who subsequently testified at trial. Ms. Leubbehusen, of course, lost her voice and her ability to tell her story when she lost her life.

[2] Unless otherwise specified, all record citations refer to the proceedings before the Honorable Samuel Rosen, who presided at defendant's trial.

[3] We regret the Indiana Supreme Court's statement that according to Mary Lee, Schiro "told Leubbehusen he would make love to her." As far as we can tell, Mary Lee's testimony never used or suggested the term "made love," with its consensual connotations. Lee said that Schiro said "he did it to [Leubbehusen]," and that he raped her. R.1426, 1427.

R. 1428-1429 (testimony of Mary Lee). Schiro hit her on the head with a vodka bottle until it shattered. *Id* at R. 1428, 1429, 1430. Luebbehusen was fighting Schiro. *Id*. He picked up an iron and beat her with it; she was fighting him. She was still fighting him when he strangled her to death. *Id*., R. 647-648 (testimony of Dr. Albert Venables.) He then dragged her body from the bedroom to the living room where he performed vaginal and anal intercourse on the corpse and chewed on several parts of her body. R. 44 (psychiatric evaluation by Dr. Bernard Woods), R. 1429 (testimony of Mary Lee), R. 1738, 1751 (testimony of Dr. Frank Osanka).

When Schiro left Luebbehusen's house he took one of the plastic dildos with him and threw it in the trash behind a tavern in Vincennes. R. 1431 (testimony of Mary Lee). Schiro also took gloves that he had been wearing so as not to leave any fingerprints. *Id*. at R. 1432, 1433. He gave the gloves to his girlfriend Mary Lee who washed them, cut them in little pieces and threw them away.[4]

The following morning, February 5, 1981, Luebbehusen's roommate Darlene Hooper and her ex-husband Michael Hooper discovered Luebbehusen's body near the doorway. R. 439 (testimony of Michael Hooper). Luebbehusen's legs were spread apart and her slacks were pulled down around her ankles. *Id*. at R. 442. She had many bruises and cuts on her body, which included tooth marks, and a vaginal laceration. R. 653, 649, 657, 661-662 (testimony of Dr. Albert Venables). Blood covered the walls and floor, and parts of the house were in disarray. R. 442 (testimony of Michael Hooper), R. 543-547 (testimony of Dennis Buickel). Michael Hooper called the police, who recovered a shattered vodka bottle and a broken iron in addition to other evidence. R. 439

[4] Lee later turned the pieces over to detectives. R.1433 (testimony of Mary Lee), R.808 (testimony of Donald Erk).



(testimony of Michael Hooper), R. 479, 480, 552-554 (testimony of Dennis Buickel).

A few days later, Luebbehusen's automobile was discovered approximately one block away from the Second Chance Halfway House. R. 939-940 (testimony of Keith Shiver).[5]

### B. *Procedural History*

Because the judicial system has considered Schiro's case for over ten years, this section briefly addresses the major procedural history of Schiro's case. On September 12, 1981, in the Brown Circuit Court, in Nashville, Indiana, petitioner Thomas Nicholas Schiro was convicted of murder while committing or attempting to commit rape, Ind.Code § 35-42-1-1(2) (Burns 1979). On October 2, 1981, Judge Samuel R. Rosen pronounced a sentence of death despite a jury recommendation to the contrary. Because Judge Rosen imposed the death penalty, the case was automatically appealed to the Indiana Supreme Court. While the case was pending on direct review, the Indiana Supreme Court granted the state's petition to remand the case to Judge Rosen to make written findings of fact regarding aggravating and mitigating circumstances. Judge Rosen affirmed that at sentencing the state had proved the existence of one aggravating circumstance beyond a reasonable doubt—that "the defendant committed the murder by intentionally killing the victim while committing or attempting to commit * * * rape." Trial Court's Nunc Pro Tunc Pronouncement of Sentencing of February 23, 1983. Judge Rosen found no mitigating factors. *Id*. On direct appeal to the Indiana Supreme Court, Schiro raised numerous issues. He claimed that the Indiana death penalty statute violated the In-

[5] A police search of the defendant's room uncovered additional physical evidence of the crime. R.735-747 (testimony of Donald Erk).

diana and United States Constitutions, the trial court erred in imposing the death penalty, the warrant for the search of his room was improperly issued, his confessions were unlawfully admitted into evidence, a letter he wrote regarding his prior criminal acts was improperly excluded from evidence, the jury was not supplied with proper verdict forms, and the pre-sentence report contained improper information. The Indiana Supreme Court rejected each of Schiro's arguments, upheld his conviction and sentence, and remanded the case to the trial court for determination of the date of execution of the death sentence. *Schiro v. State*, 451 N.E.2d 1047 (1983) (*"Schiro I"*). At that time, Schiro sought review of his death penalty conviction in the Supreme Court of the United States but it denied his petition for writ of certiorari. *Schiro v. Indiana*, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699.

Schiro petitioned for post-conviction relief in the Brown Circuit Court on May 11, 1984. His petition was heard by the Honorable James M. Dixon acting as a special judge. After a hearing, Judge Dixon denied the petition. The Indiana Supreme Court reviewed Schiro's post-conviction claims that the trial judge who sentenced him was biased and improperly considered evidence of Schiro's behavior at trial, and that he was denied effective assistance of counsel. Again, the Indiana Supreme Court affirmed the judgment of the trial court. *Schiro v. State*, 479 N.E.2d 556 (1985) (*"Schiro II"*), and the Supreme Court of the United States again denied Schiro's petition for writ of certiorari to vacate the death sentence. *Schiro v. Indiana*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (1986).

Schiro filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Indiana. Chief Judge Allen Sharp remanded the case to the Indiana courts in order for Schiro to exhaust all available state remedies. He then filed a second petition



for post-conviction relief in the Indiana Circuit Court, which petition was reviewed and denied by Special Judge John Baker of Bloomington, Indiana. The Indiana Supreme Court reviewed Schiro's case for the third time and again affirmed. It rejected Schiro's contentions that he was denied effective assistance of counsel at trial (on direct appeal and on his first petition for post-conviction relief), that the trial court erred in finding that certain allegations were *res judicata* or waived, that the jury's guilty verdict for murder while committing a rape established that the defendant lacked the requisite mental state required for imposition of the death penalty, and that these alleged errors, taken together, constituted prejudice warranting reversal. *Schiro v. State*, 533 N.E.2d 1201 (1989) (*"Schiro III"*), certiorari denied, *Schiro v. Indiana*, 493 U.S. 910, 110 S.Ct. 268, 107 L.Ed.2d 218.

The case was then fully and independently reviewed on habeas corpus by Chief Judge Sharp of the Northern District of Indiana, who issued a final judgment denying habeas relief, 754 F.Supp. 646 (N.D.Ind.1990), and also issued a certificate of probable cause to appeal. This Court has assumed jurisdiction under 28 U.S.C. § 1291.

## II.

### *A. Judicial Imposition of the Death Penalty*

Under Indiana law, a trial judge determines a defendant's sentence after the jury issues its sentencing recommendation. Indiana Code § 35-50-2-9 (Burns 1979) states that "[t]he court shall make the final determination of the sentence, after considering the jury's recommendation." The Indiana Code further states that "[t]he court is not bound by the jury's recommendation." On appeal in this Court, Schiro argues that the Indiana Death Penalty statute violates constitutional guarantees provided by the Fifth, Eighth and Fourteenth Amendments to the United States Constitution.

The constitutional challenge raised by petitioner would indeed be a significant one if the Supreme Court had not largely resolved the matter in *Spaziano v. Florida*, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984). In *Spaziano*, the Court held that a judge may impose the death penalty despite a jury's recommendation to the contrary, since defendants have no constitutional right to jury sentencing in capital cases. Subsequent Supreme Court decisions have confirmed that holding. "The decision whether a particular punishment—even the death penalty—is appropriate in any given case is not one that we have ever required to be made by a jury." *Clemons v. Mississippi*, 494 U.S. 738, 745-746, 110 S.Ct. 1441, 1446-1447, 108 L.Ed.2d 725 (1990) (quoting *Cabana v. Bullock*, 474 U.S. 376, 385, 106 S.Ct. 689, 696, 88 L.Ed.2d 704 (1986)). Schiro concedes that the constitution does not require jury sentencing in capital cases. He also concedes that under *Spaziano* a judge may impose the death penalty despite a jury's recommendation to the contrary. However, he attempts to disinguish *Spaziano* on the basis that the "*Tedder* standard" [6] was employed in *Spaziano* but not in his case. According to Schiro, the *Tedder* standard is constitutionally necessary under *Spaziano*. Thus he contends that the Indiana Supreme Court's failure to adopt and employ the *Tedder* standard in his case renders his sentence unconstitutional.

This Court is not persuaded that *Spaziano* requires or that reasoning commends such a holding. Under *Spaziano*, a reviewing court's responsibility "is not to second-guess the deference accorded to the jury's recommendation in a particular case, but to ensure that the result of the process is not arbitrary or discriminatory." *Id.* at 468 U.S. at 465, 104 S.Ct. at 3165. See also *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Review designed to invalidate arbitrary or discriminatory sentences not only provides a more direct link to values of fairness and consistency, but also provides a more judicially manageable standard than reviewing the level of judicial deferance accorded to the jury. Short of mind-reading or the submission of evidence regarding a sentencing judge's thought processes, this Court knows of no way to distinguish a case in which a trial judge gave serious consideration to the jury's sentencing recommendation before rejecting it, from a case in which the trial judge did not give serious consideration to the jury's recommendation before rejecting it. In short we cannot discern a practicable standard for reviewing the amount of deference the trial judge accorded to the jury's recommendation.

This Court, of course, seeks to ensure that the application of the death penalty statute is neither arbitrary nor discriminatory. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), sets forth three criteria to determine whether a state has appropriately limited a sentencer's discretion. The statutory scheme must furnish clear and objective standards, specific and detailed guidance, and an opportunity for rational review of the process for imposing the death sentence. *Id.* at 427, 100 S.Ct. at 1764 (Stewart, J., plurality opinion); *Stringer v. Black*, —— U.S. ——, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992) (explicitly applying the *Godfrey* principle to a "weighing" state). Furthermore, a sentencing scheme must narrow the class of persons eligible for the death penalty. *Lowenfield v. Phelps*, 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). Indiana's list of aggravating and mitigating factors provides fixed, objective and uniform discretionary constraints to guide death penalty sentencing decisions. Although Indiana

[6] Under the "*Tedder* standard," *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975), a trial judge may sentence a defendant to death despite a jury recommendation to the contrary if the evidence favoring the death penalty is "so clear and convincing that no reasonable person could differ." Although the Indiana Supreme Court had not adopted the *Tedder* standard at the time of Schiro's case, that court subsequently adopted it in *Chavez v. State*, 534 N.E.2d 731 (1989).

vests sentencing authority in a judge rather than a jury, the judge's discretion is limited by the same factors which limit the jury's sentencing discretion. Before a judge can impose the death sentence she must find the existence of one of nine aggravating circumstances beyond a reasonable doubt. Ind.Code § 35-50-2-9 (Burns 1979). In addition, the trial judge must find that any aggravating factors outweigh any mitigating factors. *Id.* Not only has Indiana enumerated clear, objective and specific standards for imposing the death penalty, but it has also required the sentencing judge to make written findings with respect to those factors in order to facilitate appellate review. Ind.Code § 35-4.1-4-3 (Burns 1979). As a result of these safeguards, the Indiana death penalty statute will not lead to arbitrary or discriminatory results generally or in Schiro's case. There is no one set way for a state to set up its capital sentencing scheme. *Spaziano*, 468 U.S. at 464, 104 S.Ct. at 3164. In light of studies that jury sentencing leads to racial discrepancies in capital sentencing, *McCleskey v. Kemp*, 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987), a state might rationally conclude that judicial sentencing could prove to be a more desirable alternative. Regardless of its rationale, a state may constitutionally establish pure judicial sentencing in capital cases or it may permit judicial sentencing upon a non-binding, advisory recommendation from a jury, as Indiana has chosen to do.

Schiro does not contend that imposition of the death sentence in his case was either arbitrary or discriminatory. His crime was not only heinous but deliberate and calculated. As Judge Rosen noted in his pronouncement of sentence, this crime involved cruel and sadistic acts; yet Schiro wore gloves while committing those acts so as not to leave fingerprints. He makes no claim that he is innocent of the crimes charged, nor could he in light of the overwhelming testimony and physical evidence. In addition, extensive evidence revealed that he committed numerous other brutal and sadistic acts which cast doubt on his character and his ability to be rehabilitated.



Some may contend that "a judge should not have the awesome power to reject a jury recommendation of life." *Schiro v. Indiana*, 475 U.S. 1036, 106 S.Ct. 1247, 89 L.Ed.2d 355 (Marshall, J., dissenting from denial of certiorari). But under the Supreme Court's jurisprudence, which is binding on this Court, a state may elect to give its trial judges such power. While a judge's power may exceed constitutional boundaries if her judgments are arbitrary or discriminatory, what constitutes arbitrary or discriminatory sentencing need not be defined in relation to a standard of judicial deference to the jury. Because the Supreme Court established only that *Tedder* was a "significant safeguard," *Spaziano*, 468 U.S. at 465, 104 S.Ct. at 3165, not that it was an essential one, we reject Schiro's assertion that the sentencing scheme applied in his case can be meaningfully distinguished from that at issue in *Spaziano*.

B. *Double Jeopardy*

Schiro also contends that imposition of the death penalty in his case violates the Double Jeopardy Clause of the Fifth Amendment of the United States Constitution as applied to the states through the Fourteenth Amendment. *Benton v. Maryland*, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). That Clause provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." The prohibition against Double Jeopardy only applies "if there has been some event, such as an acquittal, which terminates the original jeopardy." *Richardson v. United States*, 468 U.S. 317, 325, 104 S.Ct. 3081, 3086, 82 L.Ed.2d 242 (1984). Thus Schiro's argument hinges on his claim that he was acquitted of intentional murder. Specifically, Schiro claims that either the jury's conviction for murder while committing or attempting to commit a rape constituted

an acquittal on the murder charge, or that the jury's sentencing recommendation acted as an acquittal. Each of these assertions will be addressed in turn.

At trial, the jury was offered potential verdicts of murder, murder while committing or attempting to commit rape, and murder while committing or attempting to commit deviate sexual conduct. R. 108. The jury found Schiro guilty of felony-murder, murder during the course of a rape, and left blank spaces beside the other two counts on the jury form. R. 108. The felony-murder charge does not require the prosecution to prove that Schiro killed Luebbehusen intentionally. Schiro argues that the jury's conviction for felony-murder acted as an acquittal on the intentional murder charge and that the jury necessarily found that Schiro did not murder Luebbehusen intentionally. In order to assess the effect of the jury's findings, this Court looks to state law. *United States ex rel. Young v. Lane*, 768 F.2d 834, 841 (7th Cir.1985) ("states possess substantial latitude to decide *which* decisions in the criminal process are to be treated as 'acquittals' "), certiorari denied, *Young v. Lane*, 474 U.S. 951, 106 S.Ct. 317, 88 L.Ed.2d 300. The Indiana Supreme Court squarely rejected Schiro's argument that he was acquitted of intentional murder. *Schiro v. State*, 533 N.E.2d 1201 (Ind.1989). That Court stated that "[felony murder] is not an included offense of [murder] and where the jury, as in the instant case, finds the defendant guilty of one of the types of murder and remains silent on the other, it does not operate as an acquittal of the elements of the type of murder the jury chose not to consider." *Id.* Since the jury's verdict did not amount to an acquittal under the state law, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen. Therefore, this double jeopardy argument must fail.[7]

[7] The collateral estoppel argument raised, not by Schiro, but by Justice Stevens' opinion respecting denial of certiorari in this case, does not change our understanding. 493 U.S. 910, 110 S.Ct. 268, 270, 107 L.Ed.2d 218. *Ashe v. Swenson*, 397 U.S. 436, 90 S.Ct. 1189, 25 L.Ed.2d 469 (1970), bars relitigation where an issue of ultimate fact has been previously determined by a valid and final judgment. However, the defendant must show that the jury's verdict actually and necessarily determined the issue he seeks to foreclose. *United States v. Patterson*, 827 F.2d 184 (7th Cir.1987) (per curiam). Here Schiro's conviction for murder/rape did not act as an acquittal with respect to the pure murder charge as a matter of state law. Thus the jury's verdict did not determine the issue of intentionality.



Next, we address Schiro's contention that the jury's sentencing recommendation constituted a final judgment of acquittal. Schiro cites *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981), to support his proposition that the Indiana jury's advisory sentencing recommendation operated as an acquittal. Once again, the Supreme Court's holding in *Spaziano* invalidates Schiro's claim. According to *Spaziano*, *Bullington* does not apply to cases in which a judge imposes the death penalty against the jury's advisory recommendation. *Spaziano*, 468 U.S. at 453, 104 S.Ct. at 3158. Unlike the binding sentencing recommendations issued by Missouri juries at the time of *Bullington*, Indiana law leaves no doubt that its juries' sentencing recommendations are only recommendations. The assumption that "the jury's constitutional role in determining sentence was equivalent to its role in determining guilt or innocence" is no longer tenable in light of *Spaziano*. *Cabana v. Bullock*, 474 U.S. 376, 388 n. 4, 106 S.Ct. 689, 697, n. 4, overruled on different grounds, *Pope v. Illinois*, 481 U.S. 497, 504 n. 7, 107 S.Ct. 1918, n. 7, 95 L.Ed.2d 439 (1987). Schiro had no legitimate expectation that the jury's recommendation would be his final sentence. Cf. *United States v. Di Francesco*, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980) (holding that modification of a sentence is not violative of the Double Jeopardy Clause when a defendant has no legitimate expectation of

finality in the original sentence). No final conviction could be entered until the sentence was entered. And under Indiana law, no sentence could be entered, except by the trial judge—the only person given authority to determine the defendant's sentence. Because the jury's sentencing recommendation was not a final judgment, it could not act as an acquittal. Judge Rosen declared that the state had proved the existence of an aggravating factor beyond a reasonable doubt [8] and the jury never acquitted Schiro on the element of intentionality. Thus we reject Schiro's double jeopardy claim.

C. *Ineffective Assistance of Counsel*

Schiro also contends that he was denied effective assistance of counsel. He bases his contention on four alleged failures of trial counsel, namely, (1) counsel failed to present evidence of mitigating circumstances, (2) counsel failed to adequately prepare or investigate the case, (3) counsel failed to submit guilty but mentally ill verdict forms to the jury and (4) counsel failed to request that the jury be sequestered or adequately admonished. In order to prove that he received ineffective assistance of counsel, Schiro must show both that counsel's performance fell below an objective standard of reasonableness and that but for counsel's unreasonable conduct, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 700, 104 S.Ct. 2052, 2071, 80 L.Ed.2d 674 (1984), rehearing denied, 467 U.S. 1267, 104 S.Ct. 3562, 82 L.Ed.2d 864; *United*

[8] The Indiana Supreme Court held that "[t]he [trial] court, as prescribed by the death penalty statute, found the existence of an aggravating circumstance proved beyond a reasonable doubt." *Schiro v. State*, 479 N.E.2d 556. Whether the trial court appropriately determined the existence of an aggravating factor under Indiana law is a question of state law which Schiro has not asked this Court to review and which is not within the ambit of habeas review.



*States v. Lane*, 819 F.2d 798, 802 (9th Cir.1987). Although this standard applies to counsel's conduct as a whole, for clarity this Court will examine Schiro's first and primary contention separately.

D. *Mitigating Circumstances*

Schiro alleges that the trial judge's finding of no mitigating circumstances was due to his trial counsel's failure to present any evidence of mitigating circumstances to the court. As an initial matter, this Court notes that this assertion is patently incorrect. His counsel did attempt to prove the existence of a mitigating factor, he strenuously argued that Schiro's "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication"—one of the seven mitigating factors provided by Indiana's death penalty statute. Indiana Code § 35-50-2-9.

Judge Rosen's denial of the existence of any mitigating factors was not because Schiro's counsel did not raise any argument for mitigation, but because the judge found that such arguments did not justify mitigation. At trial, Schiro argued that he was a sexual sadist and that his extensive viewing of rape pornography and snuff films rendered him unable to distinguish right from wrong. In support of this assertion, his expert witness, Edward Donnerstein, testified that after a short exposure to aggressive pornography "non-rapist populations * * * begin to endorse myths about rape." R. 1549 (testimony of Edward Donnerstein). "They begin to say that women enjoy being raped and they begin to say that using force in sexual encounters is okay. Sixty percent of the subjects will also indicate that if not caught they would commit the rape themselves." *Id.* In addition to Mr. Donnerstein's testimony that pornography generally encourages men to commit acts of violence against women, one of defendant's other expert witnesses testified that

Schiro's viewing of pornography actually encouraged him to commit the acts of violence at issue in this case. Dr. Frank Osanka testified that Schiro viewed pornographic films from age six, and throughout his childhood and his adulthood, that led him to be aroused by women's pain and taught him techniques of rape. R. 1713, 1727 (testimony of Dr. Frank Osanka, listing at least two specific films which encouraged Schiro's criminal activity). A written autobiographical statement of petitioner's which was read to the jury is perhaps most telling: "I can remember when I get horny from looking at girly books and watching girly shows that I would want to go rape somebody. Every time I would jack off before I come I would be thinking of rape and the women I had raped and remembering how exciting it was. The pain on their faces. The thrill, the excitement." R. 1368-1369 (Schiro's autobiographical statement). At closing argument Schiro's counsel relied on Dr. Osanka and Mr. Donnerstein to support his claim that "the pattern is clear, premature exposure to pornography and continual use with more violent forms created one thing, created a person who no longer distinguishes between violence and rape, or violence and sex."

Schiro contended either that pornography is a mitigating factor akin to intoxication or mental disease or defect which rendered him unable to appreciate the criminality of his conduct, or that pornography caused him to suffer from sexual sadism, which in turn rendered him unable to appreciate the wrongfulness of his conduct. After hearing such evidence, Judge Rosen rejected the arguments on the basis that defendant was sadistic, not psychotic or insane, and on the basis that he was able to appreciate the wrongfulness of his conduct. Clearly, Indiana may determine that sadism (or voyeurism, exhibitionism, and necrophilia as also claimed) does not amount to a mental disease or defect which warrants reduced punishment. This is particularly so because the primary manifestation of these



conditions is criminal, anti-social conduct and under Indiana law "[t]he terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct." R. 405, *Richardson v. State*, 170 Ind.App. 212, 351 N.E.2d 904 (1976). Moreover, the trial judge could permissibly find from the evidence both that Schiro understood the criminality of his conduct and that pornography is not a mental disease or defect which would permit a finding of insanity.

The troubling aspect of Schiro's defense is that his argument that pornography reduced his capacity to understand the criminality of his conduct, if successful, would not only excuse him from imposition of the death penalty but further excuse him for his criminal conduct altogether on the basis that he was not guilty by reason of insanity. Under Schiro's theory pornography would constitute a legal excuse to violence against women. This Court previously addressed the issue of pornography in *American Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323 (1985), affirmed, 475 U.S. 1001, 106 S.Ct. 1172, 89 L.Ed.2d 291 (1986). There we accepted the premise of anti-pornography legislation that pornographic depictions of the subordination of women perpetuate the subordination of women and violence against women.[9] However, we held that under the First Amendment pornography may not be banned because its harmful effects depend on mental intermediation. 771 F.2d at 329. It would be impossible to hold both that pornography does not directly cause violence but criminal actors do, and that criminal actors do not cause violence, pornography does. The result would be to tell Indiana that it can neither ban pornography nor hold criminally responsible persons who are encouraged to commit violent acts because of pornography! The recognition in *Hudnut* that pornography leads to violence against women does not require Indiana to establish a defense of insanity by por-

[9] See Catharine A. MacKinnon, *Towards a Feminist Theory of the State*, 195-214 (1989).

nography.[10] In *Hudnut* we said that pornographers may be liable for rape just as the instigator of a riot could be held liable for inciting that riot. 771 F.2d at 333. *Hudnut* does not suggest that the rioter or the rapist is not also culpable for his own conduct.

As for the other mitigating factors, defense counsel is not required to present mitigating evidence where none exists. Cf. *Smith v. Dugger*, 840 F.2d 787, 795 (11th Cir. 1988), certiorari denied, 494 U.S. 1047, 110 S.Ct. 1511, 108 L.Ed.2d 647 (1990). If Schiro alleges prejudice from his trial counsel's failure to present mitigating evidence at trial, as he does here, he must offer some piece of mitigating evidence that should have been presented to the trial court but wasn't. He offers none, and we fail to see what evidence of mitigation might have been offered.[11] Schiro did present evidence relating to his drug and alcohol use, but the trial court found that evidence insignificant since Schiro acted deliberately and had the capacity to appreciate the wrongfulness of his conduct. As for his criminal history, Schiro's record is replete with violent crimes. R. 113. His own expert believed that Schiro had committed some nineteen to twenty-four rapes. R. 1721 (testimony of Dr. Frank Osanka). Schiro's girlfriend testified regarding Schiro's numerous brutal, sadistic and life-threatening assaults on herself and her son. R. 1181, 1446, 1461, 1463, 1465, 1467, 1472. Linda

[10] Under repeated questioning by Judge Rosen as to the relevance of his testimony, Schiro's own witness conceded that even though the viewing of pornography is relevant to show whether Schiro sees rape as a violent crime, viewing pornography does not have "any relationship to competency or legal sanity." R.1560-1561 (testimony of Mr. Donnerstein). Indiana can decide, and appears to have decided in this case, that a defendant cannot excuse his conduct by showing that in spite of his awareness of a person's non-consent to sexual relations, he believed that he had a right of sexual access or dominion over that person.

[11] Indiana Code § 35-50-2-9(c) (Burns 1979) sets forth mitigating circumstances appropriate for consideration.



Summorford testified that Schiro broke into her home, held a gun to her son's head and raped her in front of her six-year-old daughter who has cerebral palsy. R. 1830-1841. The jury's verdict settled any questions as to whether the victim consented to sexual intercourse, see *O'Connor v. State*, 529 N.E.2d 331 (Ind.1988), and she certainly did not consent to be murdered. Schiro's participation was as a principal and that participation was far from minor. Moreover, Schiro did not act under the domination of another person. Because Schiro has not shown any evidence of mitigating factors that his trial counsel should have offered but unreasonably and prejudicially failed to offer, his ineffective assistance claim on this point is devoid of merit.

Schiro's other ineffective assistance claims are equally devoid of merit. He has not shown and the record does not reveal evidence that his trial counsel failed to prepare Schiro's case adequately. Counsel's failure to submit certain verdict forms to the jury was not prejudicial since the jury was accurately instructed on those possible verdicts. Finally, we do not presume prejudice where the defendant's counsel has failed to request that the jury be sequestered. *Bell v. Duckworth*, 861 F.2d 169, 170-171 (7th Cir.1988), certiorari denied, 489 U.S. 1088, 109 S.Ct. 1552, 103 L.Ed.2d 855 (1989). Moreover, in contrast to Schiro's assertion, Judge Rosen repeatedly admonished the jury not to talk about the case with others. R. 579, 702-703, 934-936, 1064-1065, 1169-1170, 1288-1290, 1497-1498, 1660, 1791-1793.

Petitioner has not shown that his counsel's performance fell below an objective standard of reasonableness or that he was prejudiced by any such conduct. He has therefore failed to meet either of his burdens.

E. *Admissibility of Confessions*

Schiro admitted killing Luebbehusen to Kenneth Hood, Second Chance Halfway House Executive Director. At trial, Hood testified regarding the substance of Schiro's

confession. R. 888-935. On appeal petitioner complains that his confession was obtained in violation of the Fifth, Fourth and Fourteenth Amendments to the Constitution because he was not notified of his *Miranda* warnings; he therefore argues that his confessions and the ensuing confessions to his girlfriend should have been suppressed at trial.

The procedural safeguards of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), only apply to custodial interrogations. *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990); *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed.2d 714 (1977). In order to determine whether Schiro's confession to Hood was made during the course of a custodial interrogation, the Indiana Supreme Court examined the surrounding circumstances. According to that court, Schiro approached his work release counselor and asked to discuss something "heavy." The work release counselor thought that Shiro's problem concerned his alcoholism and referred him to Executive Director Ken Hood, to whom Schiro had spoken earlier that day. Hood felt that Schiro wanted to talk and asked him general questions regarding the reason for his seeking their conversation.

> "Although Hood said every indication was against it, he finally asked Schiro if he drove the victim's car and parked it near the facility. When Schiro nodded affirmatively, Hood told him he did not believe him because the records indicated that Schiro had been in the facility when the crime took place. Schiro said that the night watchman or manager had falsified the sign-in sheet. Still disbelieving, Hood asked some more questions about the murder. When Schiro mentioned that he worked near the victim's apartment, and Hood knew this to be true, Hood finally believed Schiro was responsible for the murder [which Schiro had confessed to Hood]. Flabbergasted, Hood telephoned a judge for assistance. Schiro's attorney was in the judge's chambers and told Schiro to avoid saying anything about the crime. Hood then escorted Schiro to the police station."



451 N.E.2d at 1047, 1060-1061.

On the basis of these facts, the Indiana Supreme Court held that Schiro was not subject to custodial interrogation at the time of his confession to Hood. The question of custodial interrogation is a mixed question of law and fact. This Court has recently noted that mixed questions of law and fact should be reviewed under a clearly erroneous standard. *United States v. Levy*, 955 F.2d 1098, 1103 n. 5 (7th Cir.192); *Mars Steel Corp. v. Continental Bank*, 880 F.2d 928, 933-937 (7th Cir. 1989) (en banc); *Mucha v. King*, 792 F.2d 602, 604-606 (7th Cir.1986); but see *United States v. Hocking*, 860 F.2d 769 (7th Cir.1988). We have suggested without deciding that a clearly erroneous standard of review is appropirate in habeas corpus cases as well as other types of cases. *Stewart v. Peters*, 958 F.2d 1379 (7th Cir.1992); *Hanrahan v. Greer*, 896 F.2d 241, 244 (7th Cir.1990). That question need not be resolved here since the outcome of our decision would be the same under either *de novo* or clear error review.

When reviewing whether a defendant was in custody at the time of a confession, this Court examines the totality of the circumstances, especially the degree of restraint on the suspect's freedom. *United States v. Hocking*, 860 F.2d 769, 772 (7th Cir.1988) (noting that the key determination is whether at the time of interrogation the defendant was subjected to a "restraint on [his] freedom of movement of the degree associated with formal arrest"). Schiro contends that he was in custody at the time of his confession to Hood because the Second Chance Halfway House is a penal facility which confines residents unless they have express authorization to leave.

*Sureeporn Roll v. State*, 473 N.E.2d 161, 163 (Ind.App. 1985).

This Court rejects Schiro's assertion that any statement made by a defendant while he is under some type of supervision *ipso facto* constitutes custodial interrogation. *Illinois v. Perkins*, 496 U.S. 292, 110 S.Ct. 2394, 2397 (rejecting "the argument that *Miranda* warnings are required whenever a suspect is in custody in a technical sense and converses with someone who happens to be a government agent"). Cf. *Williams v. Chrans*, 945 F.2d 926, 950-954 (7th Cir.1991) (questioning by probation officer did not constitute custodial interrogation); *Minnesota v. Murphy*, 465 U.S. 420; 104 S.Ct. 1136, 79 L.Ed.2d 409 (1984) (routine meeting between defendant and his parole officer not considered to be custodial interrogation).

Schiro voluntarily approached Hood and asked to speak with him. Schiro was free to leave Hood's office at any time. The environment at the time of Schiro's confession to Hood bears slight resemblance, if any, to the type of coercive police conduct which the Fifth Amendment was designed to prevent. Cf. *Roberts v. United States*, 445 U.S. 552, 560-561, 100 S.Ct. 1358, 1364-1365, 63 L.Ed.2d 622 (1980) (no custodial interrogation where defendant initiated interview with investigators); *Miranda v. Arizona*, 384 U.S. 436, 478, 86 S.Ct. 1602, 1630 ("volunteered statements are not barred by the Fifth Amendment"). Unlike statements made during custodial interrogation without prior *Miranda* warnings, statements made during a noncustodial interrogation without such *Miranda* warnings do not enjoy any presumption of coercion. *United States v. Fazio*, 914 F.2d 950, 956 (7th Cir.1990). Because Schiro's confession to Hood was not made during custodial interrogation, *Miranda* warnings were not required and Hood's testimony regarding Schiro's confession was properly admitted into evidence at trial. As Schiro's confession was properly entered into evidence, this Court need not address Schiro's further claim that testimony regarding his voluntary confession to his girlfriend was unconstitutional as a fruit of the confession to Hood. No impropriety is asserted with respect to his confession to a fellow prisoner.



F. *Deceptive Behavior at Trial*

According to Judge Rosen, Schiro tried to deceive the jury into believing that he was mentally ill.[12] Judge Rosen stated:

> This Court personally observed the Defendant, while the jury was present, making continual rocking motions, which did not stop throughout the trial, *except* when the jury left the courtroom. In the court's outer chambers, out of the presence of the jury, in the eight days of trial, the Court frequently observed the Defendant sitting calmly and not rocking. It is apparent to the Court that this may well have influenced and misled the jury in its recommendation.

Trial Court's Sentencing Judgment of October 2, 1981. On appeal, Schiro asserts violations of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because Judge Rosen allegedly based his decision to impose the death penalty on his outer chambers observation of Schiro.

The Indiana Supreme Court found that Judge Rosen did not consider Schiro's apparently deceptive behavior at trial as an aggravating factor which justified imposition of the death penalty. *Schiro v. State*, 479 N.E.2d 556 (1985). Rather, Judge Rosen's observation sought to explain why the jury recommended a sentence which was against the manifest weight of the evidence produced

[12] The trial judge was not the only one to observe that some of Schiro's mannerisms appeared to be "a caricature of someone mentally ill" R. 44 (psychiatric evaluation by Dr. Bernard Woods).

at trial. The Indiana Supreme Court's factual determination is binding on this Court absent clear error, 28 U.S.C. § 2254(d), which has not been shown.

G. *Manacles and Shackles*

Schiro contends that as he exited an elevator at the courthouse and passed through a hallway there, the jury viewed him in manacles and shackles. As a result he claims to have been denied both effective assistance of counsel and due process of law. A jury's inadvertent observation of a defendant in shackles and manacles outside the courtroom is presumptively non-prejudicial unless the defendant can affirmatively show that jurors were prejudiced by such an encouter. *United States v. Jones,* 696 F.2d 479 (7th Cir.1982), certiorari denied, 462 U.S. 1106, 103 S.Ct. 2453, 77 L.Ed.2d 1333 (1983). The state has a legitimate interest in seeking that the defendant once outside the courtroom remains in custody and does not flee. *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986).

The Indiana Supreme Court has distinguished between cases in which jurors see a prisoner in shackles while being transported to and from court, *Sweet v. State,* 498 N.E.2d 924, 929 (Ind.1986), and cases in which jurors see a shackled prisoner during court proceedings, *Walker v. State,* 274 Ind. 224, 410 N.E.2d 1190, 1193-1194 (1980). That court has held that reasonable jurors can expect a criminal defendant to be in manacles and shackles during breaks and while being transported. *Jenkins v. State,* 492 N.E.2d 666, 669 (Ind.1986). Accordingly, the Indiana Supreme Court determined that Schiro's allegation did not demonstrate prejudice. *Schiro III,* 533 N.E.2d 1201. Where the contact between the jury and the defendant was both fleeting and inadvertent, we agree that Schiro has not met his burden of showing prejudice.



III.

This Court has considered each of Schiro's arguments and for the foregoing reasons his constitutional claims are rejected. The judgment of the district court is affirmed.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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(Caption Omitted in Printing)

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**NOTICE OF ISSUANCE OF MANDATE**

Date: June 1, 1992

To: Geraldine J. Crockett
United States District Court
Northern District of Indiana
Room 102
South Bend Division
102 Federal Building
South Bend, IN 46601

From: Thomas, F. Strubbe, Clerk

Re: 91-1509
Schiro, Thomas v. Clark, Richard
83 C 588, Judge Allen Sharp

Herewith is the mandate of this court in this appeal, along with the Bill of Costs, if any. A certified copy of the opinion order of the court and judgment, if any, and any direction as to costs shall constitute the mandate.

[ ] No record filed
[x] Original record on appeal consisting of:

| Enclosed: | To Be Returned At Later Date: |
|---|---|
| [ ] Volumes of pleadings | [2] |
| [ ] Loose pleadings | [ ] |
| [ ] Volumes of transcripts | [1] |
| [ ] Volumes of State Court pleadings | [16] |
| [ ] Volumes of State Court briefs | [7] |



| | |
|---|---|
| [ ] Volumes of State Court loose pleadings | [6] |
| [ ] Other _____ | [ ] |
| _____ | |
| Record being retained for use in Appeal No. _____ | [ ] |

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Copies of this notice sent to: Counsel of Record

(Affirmation Omitted in Printing)

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IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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(Caption Omitted in Printing)

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August 25, 1992

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This matter comes before the court for its consideration of the following documents:

1. MOTION TO RECALL MANDATE filed herein on 8/18/92, by counsel for the appellant.

2 MOTION TO ACCEPT PETITION FOR REHEARING IN BANC INSTANTER filed herein on 8/18/92, by counsel for the appellant.

3. VERIFIED PETITION TO RECALL THE MANDATE AND PERMIT THE FILING OF A PETITION FOR REHEARNG AND SUGGESTION FOR AND REHEARING IN BANC OUT OF TIME filed herein on 8/18/92, by the pro se appellant.

4. RESPONSE TO MOTIONS TO RECALL MANDATE AND ACCEPT PETITION FOR REHEARING INSTANTER filed herein on 8/25/92, by counsel for the appellees.

On consideration thereof,

IT IS ORDERED that the Motion to Recall the Mandate is DENIED.

IT IS FURTHER ORDERED that the Motion to accept Petition for Rehearing in Banc Instanter is



GRANTED and the Clerk of this court is directed to file as of 8/21/92 the petition for rehearing tendered by appointed counsel for the appellant.

IT IS FURTHER ORDERED that the Verified Petition to Recall the Mandate and Permit the Filing of a Petition for Rehearing and Suggestion for and Rehearing in Banc Out of Time is DENIED.

SUPREME COURT OF THE UNITED STATES

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No. 92-7549

THOMAS SCHIRO,
*Petitioner*

v.

RICHARD CLARK, Superintendent, Indiana State Prison, *et al.*

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

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ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

May 17, 1993